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# FAULT-BASED AND STRICT LIABILITY IN THE LAW OF NEIGHBOURS



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## Abstract

By the end of the twentieth century, and after a long line of conflicting case law, the question about the basis of liability in nuisance was settled: in Scotland, damages are awarded only upon proof of fault (*RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17). Fault, in turn, can adopt many forms: malice, intention, recklessness, negligence, and conduct causing a special risk of abnormal damage (*Kennedy v Glenbelle Ltd* 1995 SC 95).

Many aspects of this seemingly clear picture, however, remain problematic. On the one hand, the way in which this model is interpreted and applied gives place to particular forms of liability that can actually be characterised as strict. On the other hand, two other areas of the law of neighbours that overlap with the scope of nuisance do not fit entirely this model, namely the regulation of disputes over uses of water and of those arising from withdrawal of support.

The main argument of this thesis is that damages claims in the context of neighbourhood are governed by two distinct rules: a general fault-based liability rule for nuisance, and an exceptional strict liability rule for abnormally dangerous conduct. For the first of these rules, the thesis offers an evaluation of the fault model adopted in *Kennedy v Glenbelle Ltd*, explaining the interaction between its different elements and highlighting the developments that can result in forms of strict liability. For the second of these rules, the thesis develops an analysis of its elements and nature, as well as a proposal that delineates its scope of application.

This two-rule model offers a justification for the current structure of the law applicable to disputes over uses of water. The strict liability rule applicable to interferences with the natural flow of watercourses, traditionally explained as based upon the infringement of property rights, is better explained as danger-based. The regulation of disputes arising from withdrawal of support, however, is not consistent with this model, even though they have also been characterised as nuisances. It is argued that this framework entails unjustified inconsistencies, both internal and by reference to the model proposed, and that it should be adjusted accordingly.

## Lay Summary

In Scots law, there was a longstanding discussion about whether a person, in order to obtain compensation for harm caused by his neighbour's use of property, required only to demonstrate that the latter *caused* the harm (strict liability) or, additionally, that he acted with *fault*, that is, that he was negligent – i.e. not careful enough – or acted with the intention to harm (fault-based liability). But by the end of the twentieth century, this discussion was resolved: the House of Lords established that fault was indeed required, and the Inner House further clarified that fault could adopt many different forms, namely malice, intention to harm, recklessness, negligence and engaging in particularly dangerous activities.

Many aspects of this seemingly clear picture, however, are still problematic. On the one hand, this fault-based liability rule is sometimes applied or interpreted in a way in which the actual result is closer to a strict liability rule. On the other hand, some particular types of conflicts between neighbours are not fully subject to the fault-based rule: disputes over uses of shared natural water (like a river) and those arising from withdrawal of the physical support that lands or buildings provide to each other are subject to dual systems, where in some cases a fault-based rule is applied and in others a strict rule is applied.

The main argument of this thesis is that neighbour disputes in general are actually subject to two different rules: one fault-based that is applied broadly to all disputes, and one strict that is applied only to particularly dangerous activities. The thesis explains and analyses the nature, elements and scope of both of these rules, highlighting all their problematic aspects.

This model serves also to explain the way in which the law deals with conflicts over uses of water: the dual system for water also operates a distinction on the basis of danger, even though this is not the traditional explanation. The disputes about support, however, are treated differently by the law: the dual system is not based on danger, but on other elements. The thesis argues that this is not justified and that these rules should be adjusted in order to fit the proposed model.

## Declaration

According to the Postgraduate Assessment Regulations for Research Degrees, Regulation 25, I hereby declare that

- (a) this thesis has been composed by me;
- (b) this work is my own; and
- (c) this work has not been submitted for any other degree or professional qualification.

A handwritten signature in black ink, appearing to read 'MPG fetic R.', with a long horizontal stroke extending to the right.

María Paz Gatica Rodríguez

Edinburgh, 8 May 2017.



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*Viewpoint Housing Association Ltd v City of Edinburgh Council* 2007 SLT 772; [2007]  
CSOH 114

*Watt v Jamieson* 1954 SC 56

*Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601

*William Dixon Ltd v White* (1883) 10 R (HL) 45

*Woodland v Essex CC* [2014] AC 537; [2013] UKSC 66

*Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76



## List of Abbreviations

AC	Law Reports, Appeal Cases (Third Series)
App Cas	Law Reports, Appeal Cases (Second Series)
Bankton, <i>Institute</i>	A MacDouall, Lord Bankton, <i>An Institute of the Laws of Scotland in Civil Rights</i> (1751)
Bell, <i>Principles</i>	G J Bell, <i>Principles of the Law of Scotland</i> (4th edn, 1839)
Ch	Law Reports, Chancery Division (3rd Series)
ColumLR	Columbia Law Review
CSIH	Court of Session, Inner House
CSOH	Court of Session, Outer House
D	Dunlop's Session Cases
EB&E	Ellis, Blackburn & Ellis' Queen's Bench Reports
EdinLR	Edinburgh Law Review
Env LR	Environmental Law Reports
EHRR	European Human Rights Reports
ER	English Reports
Erskine, <i>Institute</i>	J Erskine, <i>An Institute of the Law of Scotland</i> (reprint of the 1st edn (1773), 2014)
EWCA Civ	Court of Appeal (Civil Division)
F	Fraser's Session Cases
Georgetown J of Intl Law	Georgetown Journal of International Law
Glegg, <i>Reparation</i>	A T Glegg, <i>A Practical Treatise on the Law of Reparation</i> (1892)
Gordon & Wortley, <i>Land Law</i>	W M Gordon and S Wortley, <i>Scottish Land Law</i> (3rd edn, 2009)
Guthrie Smith, <i>Reparation</i>	J Guthrie Smith, <i>A Treatise on the Law of Reparation</i> (1864)
GWD	Greens Weekly Digest
H & C	Hurlstone and Coltman Exchequer Reports

HarvLR	Harvard Law Review
HL	House of Lords
HL Cas	Clark & Finnelly's House of Lords Reports New Series
Hous LR	Green's Housing Law Reports
Hume, <i>Lectures</i>	D Hume, <i>Baron David Hume's Lectures 1786-1822</i> , vol 3 (edn by GCH Paton, 1952)
ICLQ	International and Comparative Law Quarterly
JLS	Journal of Legal Studies
JLSS	Journal of the Law Society of Scotland
JR	Juridical Review
Kames, <i>Equity</i>	H Home, Lord Kames, <i>Principles of Equity</i> (reprint of the 3rd (1778) edn, 2013)
KB	Law Reports, King's Bench
Law Com	English Law Commission
LQR	Law Quarterly Review
LR [-] Ex	Law Reports, Exchequer Cases
LR [-] HL	Law Reports, English & Irish Appeals
M	Macpherson's Session Cases
Macq	Macqueen Scotch Appeal Cases
Mor	Morison's Dictionary of Decisions
MLR	Modern Law Review
NILQ	Northern Ireland Legal Quarterly
OJLS	Oxford Journal of Legal Studies
PETL	Principles of European Tort Law
QB	Law Reports, Queen's Bench
QBD	Law Reports, Queen's Bench Division
R	Rettie's Session Cases
Rankine, <i>Land-Ownership</i>	J Rankine, <i>The Law of Land-Ownership in Scotland: A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland</i> (4th edn, 1909)

Reid, <i>Property</i>	K G C Reid, <i>The Law of Property in Scotland</i> (1996)
Rep LR	Reparation Law Reports
Rest (2d)	American Law Institute, <i>Restatement (Second) of the Law of Torts</i> (1979)
Rest (3d)	American Law Institute, <i>Restatement (Third) of the Law of Torts: Liability for Physical Harm</i> (2010)
RTR	Road Traffic Reports
S	Shaw's Session Cases
SALJ	South African Law Journal
SC	Session Cases
Sc Jur	Scottish Jurist
SCLR	Scottish Civil Law Reports
Scot Law Com	Scottish Law Commission
Sh Ct Rep	Sheriff Court Reports
SLPQ	Scottish Law & Practice Quarterly
SLT	Scots Law Times
SLT (News)	Scots Law Times, News Section
SLT (Notes)	Scots Law Times, Notes of Recent Decisions
SLT (Sh Ct)	Scots Law Times, Sheriff Court Reports
SME	<i>The Laws of Scotland: Stair Memorial Encyclopaedia</i>
Smith, <i>Short Commentary</i>	TB Smith, <i>A Short Commentary on the Law of Scotland</i> (1962)
Stair, <i>Institutions</i>	J Dalrymple, Viscount Stair, <i>The Institutions of the Law of Scotland</i> (tercentenary edn by D M Walker, 1981)
Thomson, <i>Delict</i>	J M Thomson, <i>Delictual Liability</i> (5th edn, 2014)
T(S)A	Tenements (Scotland) Act 2004
TulLR	Tulane Law Review
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UNSW LJ	University of New South Wales Law Journal

W&S	Wilson & Shaw's Appeal Cases, House of Lords
Walker, <i>Delict</i>	DM Walker, <i>The Law of Delict in Scotland</i> (2nd edn rev, 1981)
Whitty, 'Nuisance'	N R Whitty, "Nuisance", <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> , vol 14 (1988)
Whitty, 'Nuisance' (reissue)	N R Whitty, "Nuisance", <i>The Laws of Scotland: Stair Memorial Encyclopaedia</i> , vol 14 (reissue, 2001)
WLR	Weekly Law Reports
WN	Weekly Notes of Cases

To Yeye and Carola;  
and to Julieta, who seems to be a lot like me.





# Introduction

## 1. PROBLEM AND MAIN ARGUMENT

“Couple win right to sue whisky giant” was the headline in *The Falkirk Herald* on 3 March 2017.<sup>1</sup> The couple, Mr and Mrs Chalmers, of Bonnybridge, raised a damages claim for £100,000 against Diageo, the British multinational alcoholic beverage company, for the harm allegedly caused to their house and outdoor property by the “Angel’s Share” emanating from the defender’s neighbouring bonded warehouse. The pursuers argued that the ethanol evaporating from the whisky casks stimulated the growth of a type of fungus which covered their property in an unsightly black coating, amounting to a nuisance.<sup>2</sup> In allowing a proof before answer, the Lord Ordinary (Ericht) remarked upon what over the last thirty years has been repeated in case law and literature almost like a legal mantra: “[i]t is clear from the case law that the essential basis for liability and reparation from nuisance is *culpa*”. Yet, at the end of the same paragraph, he warned that it was also “clear from the authorities that very little may be needed by way of pleading to support an assertion of fault”.<sup>3</sup> In this case, the pursuers averred that, according to the state of scientific investigation, the defenders knew or ought to have known that the emanations were liable to cause the damage that in fact occurred, and these averments were considered sufficient to allow the case to go to proof so far as fault was concerned.<sup>4</sup>

These remarks illustrate the legacy of the two leading modern cases regarding the basis of liability in nuisance: *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*<sup>5</sup> and *Kennedy v Glenbelle Ltd*.<sup>6</sup> In the first of these decisions, the House of Lords

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<sup>1</sup> *The Falkirk Herald* (online), 3 March 2017, available at <http://www.falkirkherald.co.uk/news/business/couple-win-right-to-sue-whisky-giant-1-4382227>.

<sup>2</sup> The case does not seem to be an isolated instance, and possibly other interests are involved in the dispute: see “The big gorilla has not chosen to be socially responsible”, *The Scotsman* (online), 17 September 2012, available at <http://www.scotsman.com/news/gaynor-allen-the-big-gorilla-has-not-chosen-to-be-socially-responsible-1-2530285>.

<sup>3</sup> *Chalmers v Diageo Scotland Ltd* 2017 GWD 9-126; [2017] CSOH 36 at § 11.

<sup>4</sup> *Ibid* at § 12.

<sup>5</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

<sup>6</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95.

established fault as an essential requirement for reparation claims.<sup>7</sup> The Inner House clarified some years later, in the second of these decisions, that fault was not limited to negligence, but included other forms of fault, such as malice, intention, recklessness and conduct causing a special risk of abnormal damage.<sup>8</sup>

This apparently simple model is more problematic than it seems. Most of these forms of fault remain judicially and doctrinally underdeveloped in the context of neighbourhood. Some of them might be seen as incompatible – such as negligence, or, in the best case, of limited utility for such context – such as malice and, perhaps, recklessness. More importantly, some of these notions actually hide forms of strict liability, either in themselves – such as conduct causing a special risk of abnormal damage, or in the way they are construed – such as intention and recklessness. As suggested in the “Angel’s Share” case, very little may amount to an averment of fault – so little that *de facto* it might dispense with any relevant notion of fault. This not only undermines the apparent simplicity of this one-rule, fault-based, liability model, but also hinders the adequate understanding and development of the law.

Furthermore, an examination of other areas of the law regulating disputes between neighbours shows that the seemingly simple fault-based liability model applicable to nuisance is not replicated across the board. Indeed, pockets of (overt) strict liability are found in areas such as conflicts over uses of water and withdrawal of support, despite the fact that these disputes have experienced a taxonomical shift, from their consideration as belonging in the scope of property law doctrines, to their increasingly consistent categorisation as nuisances.

The original contribution of this thesis is the proposal of a more coherent and principled model, based on the available authority and general principles of delictual liability. This model is based upon two liability rules: a general fault-based liability rule, applicable to nuisance, and a special strict liability rule, applicable to abnormally dangerous conduct. On the basis of this model, solutions are offered for a wide number of problematic issues, either from a conceptual or a policy perspective.

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<sup>7</sup> *RHM Bakeries* (n 5) at 39-45 per Lord Fraser of Tullybelton.

<sup>8</sup> *Kennedy* (n 6) at 99-100 per Lord President Hope.

This model serves to clarify and clear the ground for future development of this currently unsatisfactory area of the law of delict.

## 2. SCOPE

The thesis is concerned with a particular type of claim and a particular type of rule: damages claims for harm caused by non-trespassory uses of land, decided by reference to private common law rules.

The restriction only to damages claims is almost self-explanatory: the thesis is about the role of fault, and only damages awards have fault as a pre-requisite. It is non-contentious that the other key remedy for nuisance, interdict, does not have such a requirement.<sup>9</sup>

The restriction to non-trespassory uses of land, in turn, seeks to limit the object of study only to those disputes that arise from the use that a landowner makes of *his own* land, excluding encroachments. In encroachment cases, even though fault on the part of the defender might have a bearing in the determination of the remedy awarded to the pursuer, it is not a requirement of any particular one.<sup>10</sup>

The focus on private common law rules seeks to exclude two further sets of rules.

On the one hand, neighbour disputes, in particular those involving public authority defenders, have increasingly been analysed from a human rights perspective, given the invocation of article 8 of the European Convention of Human Rights (right to respect for private and family life) and of article 1 of its First Protocol (protection of property) as the basis for liability under the Human Rights Act 1998, sometimes alongside common law liability in nuisance. This has been the case mainly where statutory regimes in place prevent obtaining damages awards based in

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<sup>9</sup> *RHM Bakeries* (n 5) at 42. See the discussion by E Reid, “The Basis of Liability in Nuisance” [1997] JR 162 at 165-166 and, more generally, H Burn-Murdoch, *Interdict in the Law of Scotland: with a Chapter on Specific Performance* (1933) ch IX.

<sup>10</sup> See the discussion in Reid, *Property* § 178.

common law rules,<sup>11</sup> or where the nature of the rights held by the neighbour over the property (or absence thereof) might affect his title to sue.<sup>12</sup> This dimension, however, is not explored in this thesis, for the reasoning involved in adjudicating claims under the 1998 Act is one of balancing of rights that is quite distinct from the reasoning underlying fault assessments, which are the main concern of this thesis.

Furthermore, some types of disputes between neighbours have been addressed through statutory regulations, especially in light of the industrial and urban development experienced by Britain from the nineteenth century onwards, limiting the role of common law rules. These regulations are, however, not comprehensively discussed in this thesis, not only for reasons of space but, more importantly, because they generally provide little or no light on the particular issues with which the thesis is concerned.

### 3. METHODOLOGY

The methodology of this thesis is fundamentally doctrinal. Some comparative as well as historical references are incorporated in aid of the arguments developed, but the main focus of the thesis is modern Scots law.

### 4. STRUCTURE

The thesis is structured in five chapters.

Chapter 1 sets the conceptual framework for the thesis. The arguments made in this thesis revolve around the notions of fault-based and strict liability.

Accordingly, chapter 1 sets out what these concepts are taken to mean, as well as their internal taxonomy and their boundaries with neighbouring concepts.

Chapter 2 examines the requirement of fault for damages claims in nuisance, discussing each of the different forms of fault offered by *Kennedy v Glenbelle Ltd* –

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<sup>11</sup> See, e.g. *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42; [2003] UKHL 66 (floods caused by discharge of sewage); see also *Hatton v UK* (36022/97) (2003) 37 EHRR 28 (noise caused by the operation of Heathrow Airport).

<sup>12</sup> Contrast, for instance, *Hunter v Canary Wharf Ltd* [1997] AC 655 with *Pemberton v Southwark LBC* [2000] 1 WLR 1672.

malice, intention, recklessness and negligence – as well as the notion that allegedly underlies and connects these forms of fault, namely the idea of the “fault continuum”. The model is problematic in several ways, although not necessarily those that legal scholars have identified hitherto: while the literature has focused on the alleged lack of compatibility between negligence and nuisance, it will be argued here that the other forms of fault are those that pose the greatest challenges, together with the very idea of the fault continuum.

Chapter 3 discusses the last of the forms of fault listed by *Kennedy v Glenbelle Ltd*: conduct causing a special risk of abnormal damage or, as it is renamed here, abnormally dangerous conduct. The category is especially challenging, for neither its sources nor its subsequent application are particularly helpful in clarifying its boundaries and the nature of the liability it attracts. The position advanced in this chapter is that, contrary to the orthodox view, liability based on this category is actually strict. Therefore, it is essential to define the scope of this category, and a proposal is made to that effect.

Chapter 4 is concerned with a set of rules that does not seem to replicate completely the fault-based model of liability for nuisance: those addressing disputes over conflicting uses of water. It will be argued that this category does, nevertheless, fit the wider two-rule model set by chapters 2 and 3, that is, the combination of the general liability rule applicable to nuisance with the special liability rule applicable to abnormally dangerous conduct.

Chapter 5, in turn, is concerned with a further set of rules that does not appear to follow the fault-based model of liability for nuisance: disputes arising from withdrawal of support. This category does not, in fact, fit that model, nor does it fit the two-rule model advanced by this thesis. It will be argued, however, that the specific liability rules applicable to withdrawal of support are not currently justified and that the more consistent approach would be to address these disputes within the framework here proposed.

The thesis concludes with a brief chapter summarising the key arguments presented.



# 1 Conceptual Framework

## 1. INTRODUCTION

The subject of this thesis is the basis of delictual liability in the context of neighbourhood. Consequently, throughout the thesis both descriptive and normative claims regarding this basis are made, that is, about certain conduct attracting fault-based or strict liability.

The distinction between fault-based and strict liability, however, is by no means clear-cut, so by claiming simply that liability is or should be of one or the other type, much is left unexplained. Moreover, the internal taxonomy of these two categories can also be problematic. The purpose of this preliminary chapter is, consequently, to set out the conceptual framework that underlies these claims, identifying which versions of these concepts are adopted and distinguishing them from other associated or similar concepts.

This chapter is, however, of limited theoretical reach. Each concept discussed here probably deserves a chapter – perhaps a thesis – on its own, but this thesis does not aim at elucidating them generally. The aim here is to outline some operative concepts that will serve as a frame of reference for their use throughout the four chapters that develop this thesis’ argument.

First, the notion of fault will be explored, outlining the different forms fault may adopt: intention, negligence, and recklessness (section 2), subsequently addressing the notion of “stricter-than-normal” liability and the forms this type of liability can adopt (section 3).



## 2. FAULT

### 2.1. Notion and forms of fault

As a general rule, liability to make reparation in delict is fault-based in Scots law, and strict liability is only sparingly recognised. The emphasis on fault<sup>1</sup> has been identified as “the first cardinal feature of reparation in Scots law”.<sup>2</sup> It is not entirely clear whether this was historically the case,<sup>3</sup> and the principle does not arise so clearly from the early Institutional writers,<sup>4</sup> though this is also a matter of contention.<sup>5</sup> The historical evolution of the general basis of liability goes beyond the scope of this section, but it seems reasonably clear that by the mid nineteenth century, the general principle of fault-based liability was well established in case law.<sup>6</sup>

The concept of fault is elusive. It is a matter of debate whether it is based on notions of moral blameworthiness or whether it departs from this type of consideration,<sup>7</sup> and many accounts define fault by listing and describing the different recognised forms of fault, raising the question of whether it is possible to identify some conceptual unity underlying these different forms of fault.<sup>8</sup> It is not the purpose of this chapter to solve this theoretical question. Instead this chapter sets out to

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<sup>1</sup> In this thesis, the term “fault” is preferred over the similar and also widely used “*culpa*”, for the latter is used somewhat ambiguously in legal literature and judicial dicta: sometimes it signifies negligence; sometimes, a wider notion comprehensive of other forms of fault. See the discussion by Walker, *Delict* 46-48. “Fault” is, perhaps, a more obviously comprehensive notion in this sense.

<sup>2</sup> H McKechnie, “Reparation” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 12 (1931) §1063.

<sup>3</sup> W A Elliot, “What is Culpa?” (1954) 66 JR 6 at 7. For some insights on the development of Aquilian liability in Scotland, see D W McKenzie and R Evans-Jones, “The Development of Remedies for Personal Injury and Death” in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) and Hector L MacQueen and W D H Sellar, “Negligence” in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (Oxford University Press 2000).

<sup>4</sup> Stair, *Institutions* 1.3.4 bases the obediential obligation of reparation on “delinquency”; as does Bankton, *Institute* 1.10, seemingly referring to obligations that can arise from the commission of a crime.

<sup>5</sup> McKechnie (n 2) § 1063 sees the principle illustrated in Stair, *Institutions* 1.9.6.

<sup>6</sup> See e.g. the dicta by Lord Neaves in *Mackintosh v Mackintosh* (1864) 2 M 1357 at 1363; and by Lord Inglis in *Campbell v Kennedy* (1864) 3 M 121 at 126 and *Laurent v Lord Advocate* (1869) 7 M 607 at 610-611.

<sup>7</sup> See e.g. the debate held in Scotland between W A Elliot and J J Gow in the 50s: W A Elliot, “Reparation and the English Tort of Negligence” (1952) 64 JR 1; J J Gow, “Is Culpa Amoral?” (1953) 65 JR 17; and Elliot, “What is Culpa?” (n 3).

<sup>8</sup> See, e.g. the concept of “legal fault” in P Cane, *Responsibility in Law and Morality* (2002) 78, structured as an either-or clause denoting that the concept encompasses two distinct sorts of things.

provide working concepts for the different forms of fault in operation in the neighbourhood context.

The two traditional forms of fault found in most accounts are those derived from the Roman sources:<sup>9</sup> intention and negligence. This division finds, in Scotland, support in the texts of the Institutional writers,<sup>10</sup> and served as the basis for the way in which the law of delict was structured since the time of Hume: in his chapter on obligations *ex delicto*, he gives account of intentional delicts, whereas obligations arising from negligence or inadvertency are treated as obligations *quasi ex delicto*.<sup>11</sup> Even though the term quasi-delict is no longer used in this sense, the division remained central in the legal literature: it was accepted by Guthrie Smith,<sup>12</sup> and determined the structure of Glegg's treatment up until its last edition.<sup>13</sup>

There is, however, a third form of fault, the position and content of which requires clarification: recklessness. This notion becomes particularly relevant in the context of this thesis, since *Kennedy v Glenbelle Ltd*<sup>14</sup> listed recklessness as a separate form of fault that can serve as the basis of a damages claim in nuisance. These three notions – intention, negligence, and recklessness – are explored in the following sections.

## 2.2. Intention

### 2.2.1. Ends, means, and side-effects

As a general rule, proof of negligence suffices to satisfy the fault requirement of a fault-based liability rule. Intention will be required only in particular cases.

Moreover, negligence is the more common form of fault: more often than not, people

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<sup>9</sup> Elliot, "Reparation and the English Tort of Negligence" (n 7) at 1.

<sup>10</sup> In its modern formulation, it is traced to Bell, *Principles* §§ 544 and 553; D Visser and N Whitty, "The Structure of the Law of Delict in Historical Perspective" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) at 452. The distinction between intention and negligence is, however, arguably perceptible in Stair, *Institutions* 1.9.11 and Erskine, *Institute* 3.1.13. See MacQueen and Sellar (n 3) at 524-525.

<sup>11</sup> Hume, *Lectures* ch XIV and XVI.

<sup>12</sup> Guthrie Smith, *Reparation* 3.

<sup>13</sup> A T Glegg, *The Law of Reparation in Scotland* (J L Duncan ed, 4th edn, 1955).

<sup>14</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

cause harm without meaning to do so. Consequently, at the level of the general concepts, private lawyers tend to pay less attention to intention and focus, instead, on the operation of negligence and its different elements. In addition, terminology associated with intention is unclear, as both scholars and courts use the terms “malice” and “intention” sometimes interchangeably, and sometimes to convey different meanings. Descriptions of these notions, in turn, feature a wide range of concepts, including “desire”, “motive”, “purpose”, “foresight”, “plan”, and many others.<sup>15</sup>

The first Scottish treatises on delictual liability described intention, as a general concept, in very wide – and, perhaps, confusing – terms. Guthrie Smith explains that “malice, in law, does not mean a fixed feeling of malignity, but an intention to injure”,<sup>16</sup> and later on distinguishes *culpa* from *dole*, the latter entailing injuring someone “by design”, a “wicked and depraved disposition”, a “bad heart”.<sup>17</sup> Glegg, in turn, distinguishes malice in fact, namely “personal spite, or ill-will against a determinate individual”, from malice in law, i.e. “merely the intentional doing of a wrongful act”.<sup>18</sup> Intention tended to be the object of a detailed consideration in those delicts that could only be committed with a specific intention, and the analysis was confined to their particular scope (e.g. assault, malicious prosecution, fraud, etc). This is still the case today, whereas intention as a general concept remains “ambiguous”.<sup>19</sup>

Perhaps a good illustration of this ambiguity is the definition offered by the standard book on the law of delict: according to Walker, “[i]ntention or malice or *dolus* connotes that the actor directed his mind to the conduct in question and its natural and probable consequences, and desired those consequences to result”.<sup>20</sup>

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<sup>15</sup> See, e.g. the different meanings attached to these terms and their relation with intention (though reaching diverse conclusions) in A R White, *Grounds of Liability: An Introduction to the Philosophy of Law* (1985) ch 6 and R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) ch 2.

<sup>16</sup> Guthrie Smith, *Reparation* 3. Malice “in law”, as distinguished from malice in fact, was of particular relevance in contexts where privilege required malice to be rebutted, e.g. in the case of defamation or actions by the police. Guthrie Smith seems to be looking at malice through this prism.

<sup>17</sup> *Ibid* 59.

<sup>18</sup> Glegg, *Reparation* 10.

<sup>19</sup> K McK Norrie, “The Intentional Delicts” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) at 478.

<sup>20</sup> Walker, *Delict* 43.

The first aspect that stands out from this concept is the abovementioned use of “intention” and “malice” as synonyms. In this thesis, however, the term malice is reserved particularly to identify what Reid calls “motive malice”,<sup>21</sup> that is, bad or improper motives, as discussed below.<sup>22</sup>

Further ambiguity derives from the fact that intention is predicated on two different objects: the conduct and its consequences. Conduct is intentional when it is deliberate, as opposed to automatic or accidental; consequences are intended when the conduct has the purpose to produce them.<sup>23</sup> Intention as a form of delictual fault, however, relates to consequences.<sup>24</sup>

The precise delimitation of which consequences can be considered as intended is the source of further discussion. There seems to be no significant challenge to the idea that “[i]ncluded in one’s intention is everything which is part of one’s plan (proposal), whether as purpose or as way of effecting one’s purpose(s)”.<sup>25</sup> Side-effects, on the other hand, are slightly more controversial. On one view, foreseen consequences also form part of one’s intention, even when they are neither a means nor the end of the conduct but only its by-product.<sup>26</sup> The reason is that, in all these cases, the agent has control over the alternative between a result happening or not happening; “his choice tipped the balance”.<sup>27</sup> This form of intention has been called “oblique”<sup>28</sup> or “indirect”.<sup>29</sup> The alternative view sees the inclusion of side-effects, even if they are foreseen – and even welcome – by the agent, as a utilitarian fiction that does not agree with common morality and the standards by which moral responsibilities are assessed.<sup>30</sup>

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<sup>21</sup> E Reid, “Malice in the Jungle of Torts” (2012-2013) 87 TulLR 901 at 904.

<sup>22</sup> See section 2.2.2.

<sup>23</sup> Cane (n 8) 79.

<sup>24</sup> P Cane, *The Anatomy of Tort Law* (1997) 32; Reid (n 21) at 902.

<sup>25</sup> J Finnis, “Intention in Tort Law” in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) 229.

<sup>26</sup> J Austin, *Lectures on Jurisprudence*, vol 1 (R Campbell ed, 4th edn, 1873) 436-437; H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2008) 119-120.

<sup>27</sup> Hart (n 26) 121.

<sup>28</sup> P Cane, “Mens Rea in Tort Law” (2000) 20 OJLS 533 at 535.

<sup>29</sup> J Neethling and J M Potgieter, *Neethling - Potgieter - Visser Law of Delict* (7th edn, 2006) 133.

<sup>30</sup> Finnis (n 25) 243-244. P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th edn, 1966) 368-370 contemplates unintended foreseen consequences, but admits that there are reasons for the law to treat them as intended.

Therefore, the scope of intention can vary according to the consequences that are seen as encompassed within it. A different question, however, is which of these versions of intention is necessary to satisfy an intention requirement. The issue can be illustrated by comparing the intention requirement in two different torts as they have evolved in English law: causing loss by unlawful means and misfeasance in public office.

The intention requirement in the first of these torts was analysed in the much-discussed House of Lords' decision of *OBG Ltd v Allan*.<sup>31</sup> Before this decision, the distinction that dominated the discussion was between "targeted" and "untargeted" harm. Harm was targeted when the conduct was directed at or calculated to injure the claimant's interests, and untargeted when it was a foreseen – yet not aimed at – inevitable (or even probable) consequence.<sup>32</sup> Most judicial decisions and academic commentaries favoured the targeted harm requirement.<sup>33</sup> In *OBG*, however, Lord Hoffmann and Lord Nichols abandoned the target test, to focus on the distinction between ends, means and consequences. Both judges agreed that the "mental ingredient" of the tort was satisfied if harm was either an end or a means to an end, but not if it was simply a foreseeable consequence of the defendant's conduct.<sup>34</sup> It is unclear whether the two tests would lead to different results,<sup>35</sup> and the Court of Appeal in the *Douglas v Hello Ltd* decision<sup>36</sup> had indeed attempted a parallel between the two tests, concluding that the target test was satisfied (a) where harm is an end in itself, or (b) when harm is a necessary means to an ulterior motive.<sup>37</sup>

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<sup>31</sup> *OBG Ltd v Allan* [2008] 1 AC 1; [2007] UKHL 21.

<sup>32</sup> E Reid, "That Unhappy Expression: Malice at the Margins" in S G A Pitel, J W Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) at 457; H Carty, *An Analysis of the Economic Torts* (2001) 105-106.

<sup>33</sup> Carty (n 32) at 105-108.

<sup>34</sup> *OBG Ltd v Allan* (n 31) at § 62 per Lord Hoffman, and §§ 164-167 per Lord Nicholls.

<sup>35</sup> See the discussion in H Carty, *An Analysis of the Economic Torts* (2nd edn, 2010) 82-84, who nevertheless criticises strongly the change of approach.

<sup>36</sup> *Douglas v Hello Ltd* [2006] QB 125; [2005] EWCA Civ 595, object of one of the three appeals decided in *OBG*.

<sup>37</sup> *Ibid* at § 195. The language of the target test would, however, come back shortly after in a House of Lords' decision in a case of conspiracy: *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174; [2008] UKHL 19 at § 120 per Lord Mance, and similarly at § 44 per Lord Hope ("loss caused by an unlawful act *directed at the claimants themselves*", emphasis added). Lord Neuberger, at § 224, adopted a seemingly broader notion of intention for the tort, including harm that is the "direct, inevitable and foreseeable result" of the conduct.

In contrast with the narrow approach to intention adopted for the tort of causing loss by unlawful means, a broader notion of intention is admitted for the tort of misfeasance in public office, according to the House of Lords decision in *Three Rivers DC v Bank of England (No 3)*.<sup>38</sup> The “mental ingredient” of this tort is satisfied not only when the public officer abuses his powers “specifically intending to injure the claimant” but also when he “knows that in so acting he is likely to injure the claimant”.<sup>39</sup> Consequently, not only targeted intention, but also untargeted intention will suffice.<sup>40</sup>

Consequently, side-effects are sometimes regarded as part of one’s intention in legal discourse, but the line that marks the fulfilment of an intention requirement for a particular wrong will shift depending on its nature. Thus, in the economic delicts or torts a stricter requirement is aligned with the fact that harm is, in principle, part of market competition, whereas misfeasance in public office is an affront-based wrong that justifies a more flexible approach to the intention requirement. It can also be noted that these side-effects are in some cases considered as intended even when they are not certain but only likely to result. As will be discussed in chapter 2, the notion of intention adopted by the Rest (2d) includes consequences that the defender knew were certain to happen as a result of his conduct, without distinguishing whether the consequence is a means to a further end or just a side-effect of the execution of his plan.<sup>41</sup> *Kennedy v Glenbelle Ltd*<sup>42</sup> subsequently adopted this broad approach for nuisance, despite not being an affront-based wrong, and commentary supports the possibility of establishing knowledge constructively.<sup>43</sup>

One last aspect of Walker’s notion of intention must be noted: he includes within the consequences deemed to be intended those that derive naturally and probably from the conduct. This inclusion entails the possibility of treating as intended certain consequences that are neither in the actor’s plan nor are they known side-effects of his conduct. No authority is offered by Walker to support the inclusion

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<sup>38</sup> *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1; [2001] UKHL 16 at §§ 44-46 per Lord Hope of Craighead.

<sup>39</sup> J Murphy, “Misfeasance in a Public Office: A Tort Law Misfit?” (2012) 32 OJLS 51 at 51-52.

<sup>40</sup> Reid, “That Unhappy Expression” (n 32) at 459.

<sup>41</sup> See p 37 below.

<sup>42</sup> *Kennedy* (n 14) at 99.

<sup>43</sup> See p 54 below.

apart from a reference to Salmond's chapter on intention.<sup>44</sup> But he fails to account for Salmond's view on the supposed presumption of knowledge of natural and necessary results: he believes that it is "much too wide a statement" that would eliminate the distinction between intention and negligence. In his view, it is closer to the truth to say that sometimes the law treats as intentional the consequences of recklessness, which he sees as a form of negligence,<sup>45</sup> where foreseeability – and not actual foresight – belongs.

### 2.2.2. Malice

As pointed out above, the term malice is used in legal discourse in two senses: as a synonym of intention, and as an indication of the wrongdoer's motives.<sup>46</sup> Yet, as Reid<sup>47</sup> and Cane<sup>48</sup> remark, even though they can coincide, intention and motives are not the same. Intention, as explained, points to whether the consequences of one's action were part of one's purpose or plan, i.e. whether the conduct was executed in order to bring about those consequences. Motives, on the other hand, refer to one's reasons for engaging in such conduct.<sup>49</sup>

Malice means "bad" or "improper" motives, such as those identified by Guthrie Smith as *dole*, or by Glegg as malice in fact.<sup>50</sup> More generally, "[m]alice provides a general motive answer in every day speech of two slightly different kinds: it may mean that an act was done in order to hurt another for *no* particular reason at all, or in order to do so for a *morally insufficient* reason".<sup>51</sup> If the reason why a person injures someone else is the furtherance of a legitimate interest, then his motive is not malicious.<sup>52</sup> But motives are often mixed, so the law resorts to the notion of

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<sup>44</sup> G Williams (ed), *Salmond on Jurisprudence* (11th edn, 1957) 410 *et seq.*

<sup>45</sup> *Ibid* 413.

<sup>46</sup> Walker, *Delict* 50; Reid, "Malice in the Jungle of Torts" (n 21) at 903-906.

<sup>47</sup> Reid, "That Unhappy Expression" (n 32) at 441.

<sup>48</sup> Cane, "Mens Rea in Tort Law" (n 28) at 539.

<sup>49</sup> For a more detailed discussion, see G H L Fridman, "Malice in the Law of Torts" (1958) 21 MLR 484 at 487-491.

<sup>50</sup> See p 10 above.

<sup>51</sup> J F Lever, "Means, Motives, and Interests in the Law of Torts" in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) at 56.

<sup>52</sup> Fridman (n 49) at 485; Lever (n 51) at 56.

“predominant motive”:<sup>53</sup> malice will be present when the predominant motive is improper and any other proper motive is just accessory.

It is generally submitted that motives are irrelevant for delictual liability.<sup>54</sup> Malice has, however, traditionally been regarded as relevant in particular contexts,<sup>55</sup> though even in these cases it is arguable that its role is marginal.<sup>56</sup> One of these particular contexts is precisely the one with which this thesis is concerned: harms caused between neighbours. Chapter 2 will include a discussion of the limited scope of the doctrine of *aemulatio vicini* and the place of malice within it.<sup>57</sup>

### 2.3. Negligence

Unlike intention, negligence has been widely discussed and private law literature is considerably more comprehensive. The concept is, consequently, in a better position in terms of its development, so there is no utility in reproducing much of these discussions here. Nevertheless, it is worth highlighting the difference between negligence as a form of fault and what we could call the “delict of negligence”. It is arguable that in Scots law there is no such thing as a delict of negligence, in contrast with the English tort of negligence.<sup>58</sup> It is observed, however, that nowadays both laws have converged in this area: Scots law has experienced a marked shift from the civilian tradition towards the common law in this context.<sup>59</sup> Consequently, it should be noted that negligence in this section – and in most of this thesis, unless otherwise indicated – is not used to designate the totality of the requirements that must be satisfied to hold the defender liable for his negligent conduct, i.e. duty of care, breach of the relevant standard of care, causation, etc. If a parallel can be drawn, it is with the second of these elements. Chapter 2 considers a contrast between liability in

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<sup>53</sup> Cane, “*Mens Rea* in Tort Law” (n 28) at 539.

<sup>54</sup> Walker, *Delict* 51; Cane, *Anatomy* (n 24) 35; C Witting (ed), *Street on Torts* (14th edn, 2015) 15.

<sup>55</sup> See the surveys by Lever (n 51) at 57-65 and Walker, *Delict* 51. For a more updated view, see Reid, “That Unhappy Expression” (n 32).

<sup>56</sup> Reid, “That Unhappy Expression” (n 32) at 461.

<sup>57</sup> See chapter 2 section 3.

<sup>58</sup> Smith, *Short Commentary* 658-659; Walker, *Delict* 44.

<sup>59</sup> See the evolution and possible reasons for this shift in MacQueen and Sellar (n 3).



nuisance based on negligence as a form of fault and liability based on the delict of negligence.<sup>60</sup>

Negligence, as a form of fault, seems to have been described as the breach of a duty since the time of the Institutional writers;<sup>61</sup> sometimes rather specific duties,<sup>62</sup> or more generally a duty to take care.<sup>63</sup> Specialised works on the law of delict, but also more general works, are consistent in this approach: from Guthrie Smith, who identified the unlawfulness in quasi delicts in “the way of doing the act [...] because it is done without the level of required care”,<sup>64</sup> to Walker, who explained negligence as involving “the existence of a legal duty to take a particular degree of care in particular circumstances and a failure to take the requisite degree of care”,<sup>65</sup> authors writing on Scots law have all followed this line of conceiving negligence as the breach of a duty of care.<sup>66</sup>

Negligence, therefore, is the failure to meet a standard of conduct, particularly a standard of care. Strictly speaking, it has no mental element;<sup>67</sup> it is predicated on the level of care deployed by the wrongdoer. It is, nevertheless, based on the element of reasonable foreseeability of harm, which could be seen as an objectivised mental state, a mental state of knowledge that the defender is deemed to have. As Lord MacMillan argued in *Muir v Glasgow Corp*,

there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.<sup>68</sup>

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<sup>60</sup> See chapter 2 section 5.2.

<sup>61</sup> Erskine, *Institute* 3.1.13, stating that “wrong may arise, not only from positive acts of trespass or injury, but for blameable omissions or neglect of duty”.

<sup>62</sup> E.g. when discussing obligations *ex delicto*, Hume, *Lectures* 186: “neglect duly to repair”; “neglect duly to fence and inclose”.

<sup>63</sup> Bell, *Principles* § 553.1.

<sup>64</sup> Guthrie Smith, *Reparation* 58.

<sup>65</sup> Walker, *Delict* 44.

<sup>66</sup> Glegg, *Reparation* 10; Gow (n 7) at 24; Elliot, “What is Culpa?” (n 3) at 29; Smith, *Short Commentary* 664; G MacCormack, “Culpa in the Scots Law of Reparation” [1974] JR 13 at 20; and more recently K McK Norrie, “Obligations: Obligations Arising from a Wrongful Act: Fault” in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1995) § 254.

<sup>67</sup> Cane, “*Mens Rea* in Tort Law” (n 28) at 536.

<sup>68</sup> *Muir v Glasgow Corp* 1943 SC (HL) 3 at 10.

But this is regardless of the defender's real mental state; actual foresight is not required.<sup>69</sup> Even if actual foresight is present, it is not this mental state that constitutes negligence, but the defender's conduct in the presence of such foresight. Negligence, in sum, "is the attribution of a quality to conduct which does not measure up to the standard of precautions demanded in the circumstances".<sup>70</sup>

Scots law's turn from its civilian roots towards the English common law involved, among other elements, a shift in the delineation of the standard of care. The Roman distinction between the three levels of *culpa* – *lata*, *levis* and *levissima* – was rejected in favour of a single criterion: that of the reasonable man in the circumstances.<sup>71</sup>

Consequently, the standard of care, i.e. what amounts to reasonable care, is highly contextualised and varies according to the circumstances of the case. It takes into account a number of elements, among which the level of risk, meaning the likelihood of harm and its magnitude, is central.<sup>72</sup> Consequently, a more demanding standard of care will be attached to acts or omissions that entail a higher risk. Available precautions and the cost of taking them can, however, also play a relevant role in raising or lowering such standard, among other elements, such as the utility of the defender's conduct, and custom and practice.<sup>73</sup>

## 2.4. Recklessness

Somewhere in-between intention and negligence lies recklessness, a notion that remains underdeveloped in our private law literature.

Even though recklessness is generally described as a mental state of indifference to risk,<sup>74</sup> Scots private law seems to have considered recklessness to be essentially

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<sup>69</sup> K W Simons, "Rethinking Mental States" (1992) 72 Boston U LR 463 at 472.

<sup>70</sup> Walker, *Delict* 45.

<sup>71</sup> MacQueen and Sellar (n 59) at 533. See *Mackintosh v Mackintosh* (n 6) at 1362 per Lord Neaves.

<sup>72</sup> *Mackintosh v Mackintosh* (n 6) at 1362-1363 per Lord Neaves; *Muir v Glasgow Corp* (n 68) at 10 per Lord MacMillan; and generally *Bolton v Stone* [1951] AC 850.

<sup>73</sup> See Walker, *Delict* 199-205; and Thomson, *Delict* §§ 5.10-5.16.

<sup>74</sup> E.g. A R White, "Carelessness, Indifference and Recklessness" (1961) 24 MLR 592 at 594; Cane, "Mens Rea in Tort Law" (n 28) at 535.

connected to negligence.<sup>75</sup> For Guthrie Smith, recklessness seemed to be a form or perhaps a cause of negligence,<sup>76</sup> whereas Glegg explained that the reason why a reckless person is to be liable is precisely because of their negligence.<sup>77</sup> This connection is set out more clearly by Walker:

Recklessness is a frame of mind in which persons may behave, an attitude of indifference to the realised possible risks and consequences of one's actions, in which consequences are foreseen and possible but not desired, not a form of negligence but a cause of negligence.<sup>78</sup>

Recklessness, then, is different from intention, in that harm is not part of one's purpose. One realises that it might occur, and just does not care – and for that reason, does not take care. Recklessness simply explains why a person was negligent.

What, then, is special about recklessness if it is simply a reason for negligence? Why would a pursuer attempt to establish this particular frame of mind that caused negligence if negligence is already a sufficient basis of liability? The answer lies precisely in the various contexts where negligence does not suffice as a basis for liability and intention is required: in some of these contexts, recklessness may be deemed enough for satisfying the intention requirement. It has so been regarded, for instance, in the context of delicts against the physical person,<sup>79</sup> defamation,<sup>80</sup> misfeasance in public office,<sup>81</sup> interference with contract,<sup>82</sup> fraud or deceit,<sup>83</sup> among others. It appears, therefore, that there is something special about recklessness; that being negligent because one tried to be careful and failed is not to be equated with being negligent simply because one did not make the effort to be careful. The law judges indifference more harshly than it does failure, equating it to intention.<sup>84</sup> But negligence remains essentially connected to recklessness.

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<sup>75</sup> See, e.g. *Campbell* (n 6) at 122 and *Laurent v Lord Advocate* (n 6) at 612.

<sup>76</sup> Guthrie Smith, *Reparation* 58.

<sup>77</sup> Glegg, *Reparation* 12.

<sup>78</sup> Walker, *Delict* 43.

<sup>79</sup> *Reid v Mitchell* (1885) 12 R 1129, esp at 1131 per Lord Justice-Clerk Moncreiff.

<sup>80</sup> *Horrocks v Lowe* [1975] AC 135 at 145 per Viscount Dilhorne and 150 per Lord Diplock.

<sup>81</sup> *Three Rivers DC v Bank of England (No 3)* (n 38) at § 44 per Lord Hope of Craighead.

<sup>82</sup> *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at 701 per Lord Denning.

<sup>83</sup> *Boyd & Forrest v Glasgow and So-Western Rly Co* 1912 SC (HL) 93 at 99 per Lord Atkinson.

<sup>84</sup> Walker, *Delict* 43.

As will be discussed in chapter 2, *Kennedy v Glenbelle Ltd*<sup>85</sup> listed recklessness as one of the possible forms of fault that could serve as ground for a damages claim in nuisance, alongside intention and negligence. This makes an odd inclusion: if nuisance is not one of those contexts mentioned above where negligence will simply not suffice, then what is the practical relevance of recklessness here? Moreover, even though *Kennedy* described recklessness in a way that seems to be very much in line with its previous understanding, as having “no regard to the question whether [one’s] action, if it was of a kind likely to cause harm to the other party, would have that result”,<sup>86</sup> it brought with it different considerations that do not fit this understanding, leading to a distorted subsequent development of the notion.<sup>87</sup>

### 3. STRICT AND “STRICTER-THAN-NORMAL” LIABILITY

#### 3.1. From fault-based to strict liability

As Zweigert and Kötz explained, the distinction between fault-based and strict liability is not an “either-or situation”: in most legal systems “liability for fault imperceptibly shades into strict liability”.<sup>88</sup> Consequently, it is possible to identify certain devices that fall somewhere in between these two notions, not only as successive steps in a historical trajectory from fault-based to strict liability, as the “transitional devices” recognised by Palmer,<sup>89</sup> but actually as mechanisms that are designed to aid the pursuer to obtain compensation without compromising radically the fault principle. It is possible, then, to say that when these mechanisms operate liability is, borrowing Zimmermann’s terminology, “stricter-than-normal”,<sup>90</sup> without becoming strict. One should be careful, however, when considering such

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<sup>85</sup> *Kennedy* (n 14).

<sup>86</sup> *Ibid* at 100.

<sup>87</sup> See chapter 2 section 6.

<sup>88</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, 1998) 649.

<sup>89</sup> V V Palmer, “In Quest of a Strict Liability Standard Under the Code” (1982) 56 *TulLR* 1317 at 1323.

<sup>90</sup> R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 1133.

mechanisms, for on occasions they are designed or applied in a way that turns them into nothing but strict liability “in disguise”.<sup>91</sup>

Both Zweigert & Kötz and Palmer identify among these devices the three mechanisms that Scottish lawyers have used to explain liability by virtue of dangerous conduct, as will be explained in chapter 3:<sup>92</sup> heightened standards of care, presumptions of fault, and the doctrine of *res ipsa loquitur*.<sup>93</sup>

Therefore, this section seeks to explain the notion of strict liability *stricto sensu*, leaving the abovementioned mechanisms of stricter-than-normal liability to be explored later.

### 3.2. Strict liability

The idea of strict liability has received widespread academic attention, much of the debate focusing on its justification and compatibility with certain moral principles.<sup>94</sup> Paradoxically, the concept itself appears to be “left largely to intuition; all have used it, many have abused it, and rarely two lawyers attached the same meaning to it”.<sup>95</sup> Palmer has tried to flesh out this intuition, listing and analysing what he identifies as the key criteria to assess whether liability is strict or fault-based: an inelastic concept of unlawful harm, a factual test of causation that disregards proximate cause and omissions, and the reduction of defences available to the defendant.<sup>96</sup> His approach is, however, flexible: none of these criteria is identified as the core of strict liability, focusing more on the overall compliance with them.<sup>97</sup> This, of course, entails the understanding that some liabilities can be stricter than others, depending on how many – and how much – of these criteria are fulfilled. Palmer rejects the traditional approach that builds a binary classification on the basis of the single criterion of

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<sup>91</sup> Ibid 1132-1133.

<sup>92</sup> See pp 114 and 119 below.

<sup>93</sup> Zweigert and Kötz (n 88) 650; Palmer (n 89) at 1323.

<sup>94</sup> See, among others, T Honoré, *Responsibility and Fault* (1999) ch 2, and R A Epstein, “A Theory of Strict Liability” (1973) 2 JLS 151; contrast with E J Weinrib, *The Idea of Private Law* (revised edn, 2012) ch 7.

<sup>95</sup> Palmer (n 89) at 1317.

<sup>96</sup> V V Palmer, “A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law” (1988) 62 TulLR 1303.

<sup>97</sup> Ibid at 1310.

presence or absence of fault, to understand strict liability “as a genus of liability and not a species”.<sup>98</sup>

Arguably, however, strict liability does have a core. This translates indeed into a binary classification built upon the basis of a single criterion, but this criterion is not the actual presence or absence of fault, but rather whether averment and proof of fault is required and, consequently, whether its absence is admitted as a defence. This does not entail a rejection of Palmer’s criteria: it is possible to conceive stricter fault-based liability rules (e.g. if there are devices that facilitate proof of fault) and stricter strict liability rules (e.g. if even defences based upon a break of the causal link are excluded<sup>99</sup>), though perhaps in this last case, the term “stricter” does not adopt a technical meaning but is only descriptive of its effect on the defender, i.e. it is a more stringent liability rule.

In his landmark essay on the moral basis of strict liability, Honoré held that “liability is strict when it attaches to us by virtue of our conduct and its outcome alone, irrespective of fault”.<sup>100</sup> But the reference to conduct in this notion can be misleading: strict liability does not rest on a negative judgment about conduct itself but only on it being the cause of a certain result. Fleming<sup>101</sup> and Cane,<sup>102</sup> on the other hand, remark that strict liability is imposed on injury that is neither intentional nor negligent, seemingly focusing on the actual absence of fault. But strict liability can be imposed when there *is* fault. Indeed, strict liability is in some contexts used as a way of relieving the victim from proving fault when it is actually present.<sup>103</sup> As a more general claim, Cane argues that criteria of liability are nested, so “conduct which attracts strict liability may satisfy the legal definitions of negligent, reckless or intentional conduct”.<sup>104</sup> Therefore, strict liability is imposed *regardless* of the presence or absence of fault, and not necessarily *without* or *in absence of* fault.<sup>105</sup>

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<sup>98</sup> Ibid at 1310-1311.

<sup>99</sup> The typical example is provided by liability rules applicable to operations of nuclear installations. See e.g. Nuclear Installations Act 1965 s 13(4)(b).

<sup>100</sup> Honoré (n 94) 23.

<sup>101</sup> J G Fleming, *An Introduction to the Law of Torts* (2nd edn, 1985) 153.

<sup>102</sup> Cane, *Anatomy* (n 24) 45.

<sup>103</sup> Honoré (n 94) 23.

<sup>104</sup> Cane, *Responsibility* (n 23) 88.

<sup>105</sup> Witting (n 54) 15; J Gardner, “Some Rule-of-Law Anxieties about Strict Liability in Private Law” in L M Austin and D Klimchuck (eds), *Private Law and the Rule of Law* (2014) at 207.

This means two things. First, a strict liability rule does not require the pursuer to aver and prove fault in order to obtain compensation. Causation between the defender's conduct and the harm suffered by the pursuer is a sufficient basis for liability. Secondly, a strict liability rule does not admit the absence of fault as a defence.

The latter of these statements is linked with Palmer's third criterion: in his view, liability is strict – or stricter – when admissible defences are fixed in number, are based upon the break of causation, and are more restricted by comparison to negligence.<sup>106</sup> But the author, loyal to his flexible approach, does not pin down the exclusion of any particular defence as conclusive, in contrast with what is submitted here.

There is one additional issue that requires to be clarified in order to delineate the boundaries of strict liability: the role of foreseeability of harm. It will become apparent in chapters 2 and 3 that, in some circumstances, foreseeability of harm is seen as a sufficient basis for the consideration of a liability rule as fault-based.<sup>107</sup> On closer examination, however, it does not play that role.

Foreseeability of harm is a pervasive notion in the law of negligence. It is present at the different stages of the negligence analysis, from the determination of the existence of a duty of care, to the standard of care and the delimitation of the scope of the defender's liability.<sup>108</sup> It has, indeed, been identified as one of the two “hallmarks” of the tort of negligence.<sup>109</sup> Yet it is also an element that is featured as a requirement in some regimes traditionally described as of strict liability, most notably, the *Rylands v Fletcher*<sup>110</sup> rule as qualified by the decision in *Cambridge Water Co v Eastern Counties Leather plc*.<sup>111</sup> This requirement has been construed not only as evidence of the expansive influence of the tort of negligence<sup>112</sup> but also as an

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<sup>106</sup> Palmer, “General Theory” (n 96) at 1330.

<sup>107</sup> See chapter 2, section 4.2.3; and chapter 3, section 3.1.3.

<sup>108</sup> Smith, *Short Commentary* 669.

<sup>109</sup> T Weir, “The Staggering March of Negligence” in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 101.

<sup>110</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

<sup>111</sup> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

<sup>112</sup> Weir (n 112) at 102.

indication of the true nature of liability as fault-based.<sup>113</sup> In Scots law, a similar position has been held by Whitty, who argued that

“strict liability” in delict has reference to the requirement of the defender’s knowledge or foreseeability of the certainty or risk of harm to the pursuer. If liability depends on the pursuer establishing that the defender knew, or ought to have known, that the harm suffered by the pursuer was certain or likely to result from the defender’s acts or omissions, or if the defender can escape liability by establishing that he did not have such knowledge or constructive knowledge, then liability cannot be said to be “strict” in the normal sense of that term.<sup>114</sup>

It is unquestionable that foreseeability of harm is an essential requirement of negligence-based liability. It is less certain, however, that foreseeability of harm is an ingredient of intention-based liability, for intention requires actual knowledge of the certainty of harm on the part of the defender, even though the establishment of such knowledge often requires resort to objective indicators.<sup>115</sup> Foreseeability is not the same as knowledge. Foreseeability, moreover, is not even implied in knowledge: if one knows a particular consequence will certainly result from one’s action, even if it cannot be said to be reasonably foreseeable, it can still be considered as an intended consequence, depending on the notion of intention adopted.

As Nolan has so simply articulated, “[a]lthough there can be no fault without foreseeability, there can be foreseeability without fault”, supporting the compatibility of a foreseeability requirement with a strict liability rule.<sup>116</sup> And this is the case because foreseeability of harm is not concerned with the definitional elements of the different forms of fault as outlined above. A rule like the one in *Rylands* is not one of negligence because, as Weir pointed out, the (un)reasonableness of the conduct is still irrelevant; “it remains a tort of strict liability for the foreseeable consequences”.<sup>117</sup> Further, the fact that harm was foreseeable is not equivalent to knowing it will certainly occur.

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<sup>113</sup> Cane, *Anatomy* (n 24) 49 and 144.

<sup>114</sup> Whitty, “Nuisance” (reissue) § 88. See also § 95, esp fn 7.

<sup>115</sup> Reid, ““That Unhappy Expression”” (n 32) at 442. The issue is discussed further in chapter 2, section 4.2.

<sup>116</sup> D Nolan, “The Distinctiveness of *Rylands v Fletcher*” (2005) 121 LQR 421 at 444.

<sup>117</sup> Weir (n 112) at 107. In a similar line, see G T Schwartz, “*Rylands v Fletcher*, Negligence, and Strict Liability” in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 215.



Requiring foreseeability of harm in the context of a strict liability rule is a way of restricting the scope of liability to exclude consequences that are simply too far-fetched. As Cane suggests, it is arguable that even when liability is strict,

people ought to be in a position to take into account of their potential legal liabilities in advance in deciding what activities to engage in and on what scale; and a person cannot reasonably be expected to take account of freakish or unexpected or unusual events.<sup>118</sup>

It has even been argued that one cannot meaningfully speak about a wrong if harm is not a foreseeable consequence of it.<sup>119</sup> In the context of negligence, such considerations are normally analysed under the notion of remoteness, but they do not seem to be exclusive to this head of liability. Whitty's argument fails to take this role of foreseeability into account.

In sum, the fact that liability only extends to foreseeable harm does not determine its nature as fault-based: strict liability may also be limited by a requirement of foreseeability.

### 3.3. Heightened standard of care

The first instance in which a case of stricter-than-normal liability has been identified is when a "heightened standard of care" operates for activities that entail a high risk.

As explained above, negligence is the breach of a standard of reasonable care, a notion that is sensitive, among other elements, to risk, i.e. the probability of harm and/or its potential magnitude.<sup>120</sup> Consequently, the standard of reasonable care associated with a given conduct will be higher if the risk created by such conduct is higher. This is the normal operation of the rules of negligence. Thus, a heightened standard of care in this sense does not entail stricter-than-normal liability. It might, of course, lead to a very demanding standard that will be very difficult to meet and, accordingly, its breach will be easier to establish and difficult to defeat. But this result is contingent: it will depend on the circumstance of all other relevant elements

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<sup>118</sup> P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, 2013) 117-118.

<sup>119</sup> D G Owen, "Figuring Foreseeability" (2009) 44 Wake Forest LR 1277 at 1277-1278.

<sup>120</sup> See p 16 above.

remaining the same, especially those that could lower the standard (e.g. high costs of taking precautions).

Some authors, however, identify a heightening of the standard of care that goes beyond reasonable care. Walker, for instance, explains that there are “a number of cases where a more stringent duty than that of merely taking reasonable care to avoid causing unintended harm to another is exacted and where liability is imposed despite the absence of ‘fault’ in the ordinary sense”.<sup>121</sup> This type of case, where what is imposed is the standard of the “highest possible” care or the “utmost” care, is not distinguishable from strict liability,<sup>122</sup> for the standard is either designed or applied in a way that leads to the inescapable conclusion of its breach.<sup>123</sup> It is an instance of what Zimmermann described as strict liability in disguise.<sup>124</sup> Its explanation in terms of fault, argues Walker, “springs from a wish to maintain the appearance that all liability in Scots law depends on fault”.<sup>125</sup>

Consequently, the only possible version of a stricter-than-normal liability based upon a heightened standard of care would be one where the standard lies just between reasonable care and the highest possible care, a possibility that appears as rather artificial – and unseen at least in the Scottish context.<sup>126</sup>

### 3.4. Presumption of fault

Liability can also be conceived as stricter-than-normal when it is imposed by virtue of the operation of a presumption of fault.

The treatment of presumptions in Scotland is a largely uncontroversial and stable matter.<sup>127</sup> The notions outlined by the Institutional writers<sup>128</sup> remain to a large

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<sup>121</sup> Walker, *Delict* 284.

<sup>122</sup> Palmer, “In Quest of a Strict Liability Standard” (n 89) at 1324.

<sup>123</sup> Zweigert and Kötz (n 88) 650.

<sup>124</sup> See n 91 above.

<sup>125</sup> Walker, *Delict* 284.

<sup>126</sup> They are conceivable, perhaps, in statutory form: Law Commission, *Civil Liability for Dangerous Things and Activities* (Law Com No 32, 1970) 2 fn 3.

<sup>127</sup> W D H Sellar, “Presumptions in Scots Law” in R H Helmholz and W D H Sellar (eds), *The Law of Presumptions: Essays in Comparative Legal History* (2009) at 219.

<sup>128</sup> See Stair, *Institutions* 4.45.9-14; Bankton, *Institute* 4.34.1-3; Erskine, *Institute* 4.2.34-38; and Bell, *Principles* § 2260.

extent relevant and are referred to in contemporary treatises on the law of evidence.<sup>129</sup>

“Presumptions”, in the words of Erskine, “are consequences drawn from facts notorious or already proved, which infer the certainty, or at least a strong probability, of other facts to be proved”.<sup>130</sup> Consequently, in a presumption of fault, the notorious or proved fact of harm being caused by a certain act or omission or in certain circumstances leads to the inference of the certainty or strong probability of the fact of it being the consequence of fault on the part of the defender, relieving the pursuer from the burden of proving it. Yet the strength of this inference depends on the nature of the presumption.

Scots law recognises three kinds of presumptions. The first kind are presumptions *juris et de jure*, or irrebuttable presumptions of law. As their name suggests, they do not admit evidence to the contrary.<sup>131</sup> Therefore, where a presumption of fault of this type is in place, the defender cannot discharge it by proving absence of fault. There is, however, general agreement in that these are not true presumptions, but simply rules of substantive law.<sup>132</sup> In this sense, an irrebuttable presumption of fault is nothing more than a rule of liability regardless of fault, i.e. a strict liability rule, according to the notion of strict liability adopted in this chapter.

Presumptions of the second kind, *juris tantum* or rebuttable presumptions of law, are generally seen as true presumptions. These are clearly recognised by statute, custom or judicial decision, and their effect is to relieve the pursuer from proving the inferred fact, burdening the defender with the proof of the absence of such fact.<sup>133</sup> Thus, when what is presumed is fault, it operates a shift in the burden of proof: it is not the defender who will have to argue and demonstrate that the defender acted with fault, but the latter who will have to argue and demonstrate that he acted

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<sup>129</sup> See M Ross and J Chalmers, *Walker and Walker The Law of Evidence in Scotland* (4th edn, 2015) § 3.1. F P Davidson, *Evidence* (2007) does not make express reference to the Institutional writers but the concepts at 125-127 coincide largely.

<sup>130</sup> Erskine, *Institute* 4.2.34.

<sup>131</sup> Ross and Chalmers (n 129) § 3.1.1.

<sup>132</sup> Davidson (n 129) § 4.46; Sellar (n 127) at 220; Ross and Chalmers (n 129) § 3.2.1.

<sup>133</sup> Ross and Chalmers (n 129) § 3.3.1.

without it to escape liability. A rule of this sort can be accurately described as one of stricter-than-normal liability.

Finally the third kind, rebuttable presumptions of fact or *hominis vel judicis*, arise by reference to the facts and circumstances of the particular case.<sup>134</sup> It is also questionable whether they are, indeed, true presumptions, as they appear to “involve no more than the drawing of the obvious inferences from the facts”,<sup>135</sup> and they have been seen simply as circumstantial evidence.<sup>136</sup> Accordingly, the court can logically infer the existence of fault from the proved facts of the case at issue. It does not entail a stricter-than-normal liability: it is still the pursuer’s burden to aver fault and to prove, if necessary, the facts that can allow the court to reach such conclusion.

Consequently, rebuttable presumptions of law are the only type of presumption the operation of which allows the characterisation of liability as stricter-than-normal.

### 3.5. *Res ipsa loquitur*

The last of the devices that is identified as turning liability into a stricter-than-normal one is the so-called doctrine of *res ipsa loquitur*; “the matter speaks for itself”.<sup>137</sup> The doctrine finds its traditional formulation in the English case of *Scott v London and St Katherine Docks Co*:

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.<sup>138</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Davidson (n 129) § 4.47.

<sup>136</sup> See discussion in Sellar (n 127) at 212-218. For Ross and Chalmers (n 129) § 3.3.1, presumptions of fact and circumstantial evidence are different, though they acknowledge that they are “frequently difficult to distinguish”.

<sup>137</sup> F M Wheelock and R A LaFleur, *Wheelock’s Latin* (7th edn, 2011) 355.

<sup>138</sup> *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 at 601. The formulation is consistently cited by Scottish authority: see, e.g. *Ballard v North British Railway Co* 1923 SC (HL) 43 at 48 per Lord Chancellor (Cave); and *Devine v Colvilles Ltd* 1969 SC (HL) 67 at 99 per Lord Guest and 101 per Lord Upjohn.

Consequently, the doctrine affords an evidentiary aid for the pursuer: it facilitates proof of negligence, specifically of the breach of the standard of care, assistance that becomes especially relevant where the relevant information about the facts is within the knowledge of the defender.<sup>139</sup>

The doctrine, however, provides moderate assistance only. According to the leading modern Scottish authority, *Devine v Colvilles Ltd*, “the maxim is of limited ambit”.<sup>140</sup> It operates within restricted boundaries and even within them its effects are limited.

These boundaries are well established:<sup>141</sup> *res ipsa loquitur* will only operate when (a) the object or structure causing the accidents was under the exclusive control of the defender at the relevant time;<sup>142</sup> (b) the accident is one that normally does not happen if proper care is taken;<sup>143</sup> and (c) the accident remains unexplained.<sup>144</sup>

When these requirements are fulfilled, there is *prima facie* evidence of negligence, and it is for the defender to offer an explanation that is consistent with the absence of negligence,<sup>145</sup> that is, “that the accident could have happened despite reasonable care on the defender’s part”.<sup>146</sup> It is important to stress this point: in some accounts, the doctrine is seen as a presumption of negligence, requiring from the defender to demonstrate his diligence in order to discharge it.<sup>147</sup> But this is not its

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<sup>139</sup> See *Elliot v Young’s Bus Service* 1945 SC 445 at 456 per Lord Justice-Clerk Cooper.

<sup>140</sup> *Devine v Colvilles Ltd* (n 138) at 100 per Lord Guest.

<sup>141</sup> See, for Scotland, Walker, *Delict* 396-397, and for England, P Giliker, *Tort* (5th edn, 2014) §§ 5.030-5.033 and Witting (n 54) 139-142.

<sup>142</sup> See, e.g. *Booth v Macmillan* 1972 SC 197 at 199, where the involvement of third parties was regarded as enough to rule out the application of *res ipsa loquitur*. In the same line, see *Murray v Edinburgh District Council* 1981 SLT 253 at 256. Contrast with the more recent *McDyer v The Celtic Football and Athletic Co Ltd* 2000 SC 379 at 385-386.

<sup>143</sup> *Ballard* (n 138) at 53 per Lord Dunedin. A good example is provided by the collision in *NG Chun Pui v Lee Chuen Tat* [1988] RTR 298, where a coach travelling in one direction crossed the central reservation and reached a vehicle travelling in the opposite direction.

<sup>144</sup> *Ballard* (n 138) at 48 per Lord Chancellor (Cave). For this reason, *res ipsa loquitur* was not applicable in *McQueen v The Glasgow Garden Festival (1988) Ltd* 1995 SLT 211 at 214: the cause of the accident was clearly explained. See also the more recent *David T Morrison & Co Ltd v ICL Plastics Ltd* 2013 SC 391; [2013] CSIH 19 §§ 37-38.

<sup>145</sup> *Devine v Colvilles Ltd* (n 138) at 100 per Lord Guest.

<sup>146</sup> Smith, *Short Commentary* 669.

<sup>147</sup> See, e.g. Viscounts Haldane and Finlay’s speeches in *Ballard* (n 138) at 49 and 52. In Fleming’s view, this “heresy” gained ground in England: Fleming (n 101) 151-152. Cane, *Responsibility* (n 23) 46 also identifies this as one of the interpretations of the doctrine.

effect; it is not a presumption of fault.<sup>148</sup> The doctrine does not alter the *onus* of proof but only throws on the defender the burden of offering an alternative explanation that is consistent with diligence.<sup>149</sup> When the defender is able to produce this explanation, he is not yet free from liability, but the pursuer has to then provide actual evidence of negligence: he is back at “square one”.<sup>150</sup> This stands in clear contrast with a proper rebuttable presumption of law in regard to fault, in the sense described above, which actually reverses the *onus* and can only be discharged by demonstrating diligence. Once diligence has been proved, the defender escapes liability. It also stands in contrast with a presumption of fact in regard to fault, for in *res ipsa loquitur* the court is tightly constrained as to the circumstances from which the inference can be made, and also as to the effects of such inference.

#### 4. CHAPTER CONCLUSIONS

This chapter set out the conceptual framework of this thesis. Its arguments are concerned with the basis of liability in the context of neighbourhood, i.e. the discussion as to liability being fault-based or strict. Consequently, this chapter outlined the working concepts that provide necessary content for such discussion.

First, fault-based liability was addressed. Even though it is difficult to outline an overarching concept of fault, some notions are offered about its different forms and the boundaries between them: intention, malice, negligence and recklessness.

Secondly, strict liability was discussed. It was distinguished, on the one hand, from “normal” fault-based liability and, on the other hand, from forms of liability that can be seen as “stricter-than-normal”: heightened standards of care, presumptions of fault, and *res ipsa loquitur*.

On the basis of these general notions, these concepts will be considered extensively in the different contexts of the law of neighbours, throughout the following chapters of this thesis.

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<sup>148</sup> *Ballard* (n 138) at 54 per Lord Dunedin; see also the useful explanation by Lord Griffiths in *NG Chun Pui v Lee Chuen Tat* (n 143) at 300-301.

<sup>149</sup> *Devine v Colvilles Ltd* (n 138) at 100 per Lord Guest.

<sup>150</sup> *Ibid* at 102 per Lord Donovan. See also Lord Justice-Clerk Cooper’s explanation in *Elliot v Young’s Bus Service* (n 139) at 455.



## 2 Nuisance

### 1. INTRODUCTION

Since the House of Lords' decision in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*, and after a long line of seemingly contradictory authorities, the question about the basis of liability in nuisance was partially settled: damages are awarded only upon proof of fault, at least as a general rule.<sup>1</sup> The settlement was only partial because Lord Fraser's speech did not make completely clear what amounted to an averment of fault.<sup>2</sup>

Further clarification arrived with the Inner House decision in the case of *Kennedy v Glenbelle Ltd*,<sup>3</sup> where the court outlined a catalogue of types of conduct that amounted to fault in this context. After reiterating fault as the basis of liability in nuisance, and further distinguishing liability in nuisance and liability in negligence, Lord President Hope stated that

*Culpa* which gives rise to a liability in delict may take various forms. In vol 14, Stair Memorial Encyclopaedia, Nuisance, para 2087, it is stated that the usual categories of *culpa* or fault are malice, intent, recklessness and negligence. To that list there may be added conduct causing a special risk of abnormal damage where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result [...].<sup>4</sup>

Subsequently, and after considering some of the relevant authority, he proceeded to explain briefly these concepts:

The essential requirement is that fault or *culpa* must be established. That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy. Or it may be done by demonstrating that the defender was at fault in some other respect. This may be because his action was malicious, or because it was

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<sup>1</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 39-45 per Lord Fraser of Tullybelton. Two different accounts of this evolution are offered by R Zimmermann and P Simpson, "Liability among Neighbours" in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000), and G D L Cameron, "Neighbourhood Liability in Scotland 1850-2000" in J Gordley (ed), *The Development of Liability between Neighbours* (2010).

<sup>2</sup> An aspect highlighted, shortly after, by the discussion in *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381. For more details about this case, see p 70 below.

<sup>3</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95.

<sup>4</sup> *Ibid* at 99.



deliberate in the knowledge that his action would result in harm to the other party, or because it was reckless as he had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result. Or it may be – and this is perhaps just another example of recklessness – because the defender has indulged in conduct which gives rise to a special risk of abnormal damage, from which fault is implied if damage results from that conduct. In each case personal responsibility rests on the defender because he has conducted himself in a respect which is recognised as inferring *culpa* by our law. So what is required is a deliberate act or negligence or some other conduct from which *culpa* or fault may be inferred.<sup>5</sup>

This model is currently analysed in terms of a fault “continuum”,<sup>6</sup> placing malice on one end of the spectrum and negligence on the other end, whereas the position of conduct causing special risk of abnormal damage within the spectrum is not clear. In this continuum, as the term itself suggests, there are no clear delimitation lines between the different categories of fault.

Apart from the questions of whether the previous authority supported the fault-based account of nuisance and whether this is the most appropriate approach for nuisance, Scots law made a choice here. The choice was seemingly animated by an intention to reassert the civilian character of the law of delict.<sup>7</sup> Paradoxically, the system that provided the model for the fault continuum was not a civilian one: as will be explained, the source of the model was the American Rest (2d), in what can perhaps be described as a partial legal transplant. This adoption, however, is not wholly unproblematic, and the aim of this chapter is to address those problems.

Five arguments will be made in this chapter. The first four arguments are attached respectively to the first four forms of fault offered by the fault continuum.<sup>8</sup> The last argument evaluates the very notion of the fault continuum. The first argument is that malice is a mostly unnecessary and unpractical form of fault in the nuisance framework (section 3). The second argument is that intention, in the broad version adopted by *Kennedy v Glenbelle Ltd* and subsequent case law and literature, comes very close to a form of strict liability, so if the aim of the courts is a firm adherence to the fault principle, then some adjustments are needed (section 4). The

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<sup>5</sup> Ibid at 100-101.

<sup>6</sup> Whitty, “Nuisance” (reissue) § 89; Cameron (n 1) at 150.

<sup>7</sup> Smith, *Short Commentary* 534; N R Whitty, “Reasonable Neighbourhood: the Province and Analysis of Private Nuisance in Scots law. Part I” (1982) 27 JLSS 497 at 498.

<sup>8</sup> Arguments related to the last alleged form of fault – causing a special risk of abnormal damage – are developed in chapter 3.

third argument is that negligence can be accommodated as a form of fault within the framework of nuisance, despite the view that negligent nuisance should be dealt with under the ordinary principles governing negligence (section 5). The fourth argument is that recklessness has developed as a mental state of pure knowledge of likelihood of harm that cannot readily be categorised as a form of fault (section 6). Finally, it will be argued that the analysis of fault as a continuum in this context is unconvincing, for two reasons. On the one hand, the categories at the extremes – malice, intention as purpose, and causing special risk of abnormal damage – are by their own nature excluded from the alleged continuum. On the other hand, even for the remaining elements, depicting fault as a continuum is conceptually inaccurate and misleading (section 7).

Before proceeding with the arguments, a brief analysis of this framework is offered.

## 2. THE FAULT FRAMEWORK ADOPTED IN *KENNEDY V GLENBELLE LTD*

In order to achieve a better comprehension and to provide the adequate background for the arguments presented in this chapter, this section offers an analysis of the fault model adopted by *Kennedy v Glenbelle Ltd* for damages claims in nuisance. First, the origin of this model will be explained (section 2.1), and the model both in the version adopted in the abovementioned decision and in its sources will be described (section 2.2). The model will then be contrasted with its “original” version, i.e. the one adopted in the Rest (2d) (section 2.3), concluding with an explanation of the notion of fault continuum used to describe the model (section 2.4).

### 2.1. Origin of the model

The origin of the model, as indicated by Lord President Hope, is para 2087 of Niall Whitty’s “Nuisance” entry in SME. Whitty was writing after *RHM Bakeries*, so the fault-based account of nuisance had already been adopted. In that context, he explained that *RHM Bakeries* left open the question of

which of the usual categories of *culpa* or fault – malice (*aemulatio* or spite), intent, recklessness, negligence, and conduct causing a special risk of abnormal danger – or in other words what types of delictual conduct on the part of the defender are actionable by reference to the test of *plus quam tolerabile*, and which categories are actionable by reference to the ordinary principles of negligence. This is probably now the most important single issue in the modern Scots law of nuisance. Yet there is scant direct Scottish authority on that issue [...].<sup>9</sup>

Whitty did not mention the source of this catalogue of types of fault, apart from a reference to the case of *Miller v Robert Addie & Sons' Collieries Ltd*<sup>10</sup> for the last category. He then stated that the lines have to be drawn “by reference to general principle, having regard also to Anglo-American authorities which afford considerable assistance”.<sup>11</sup>

In the later reissue of his “Nuisance” entry (2001), the reference to general principle and Anglo-American authorities was abandoned and replaced by a reference to *Kennedy* as approving the proposition made in the previous version of the entry.<sup>12</sup>

The model was not derived, therefore, directly from Scottish authority. It has indeed been described as “an example of legal borrowing”:<sup>13</sup> it mirrors to a great extent the model adopted by the American Rest (2d) for the basis of liability in nuisance,<sup>14</sup> to which Whitty refers throughout his analysis, in both versions of his entry.<sup>15</sup>

The content of this model will be, consequently, outlined according to the way it is presented by *Kennedy*, as well as by reference to its immediate source, that is, Whitty’s “Nuisance” original entry, with some refinements introduced in the reissue, and its mediate source, namely, the American Rest (2d), with some references to its partial successor, the Rest (3d).

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<sup>9</sup> Whitty, “Nuisance” § 2087.

<sup>10</sup> *Miller v Robert Addie & Sons' Collieries Ltd* 1934 SC 150.

<sup>11</sup> Whitty, “Nuisance” § 2087.

<sup>12</sup> Whitty, “Nuisance” (reissue) § 87.

<sup>13</sup> G D L Cameron, “Scots and English Nuisance... Much the Same Thing?” (2005) 9 EdinLR 98 at 118.

<sup>14</sup> Rest (2d) §§ 822 and 825.

<sup>15</sup> Whitty, “Nuisance” §§ 2089, 2092 and 2106; Whitty, “Nuisance” (reissue) §§ 89, 92 and 106.

## 2.2. Description of the model

### 2.2.1. The model as presented by *Kennedy v Glenbelle Ltd*

Lord Hope explained in *Kennedy* that if the test which is peculiar to nuisance – the *plus quam tolerabile* test – is satisfied and fault is established, the requirements of liability in damages for nuisance are fulfilled.<sup>16</sup> He then listed five different types of conduct that, if demonstrated, would establish fault for these purposes: negligent conduct, malicious conduct, conduct that is deliberate in the knowledge that harm will result, reckless conduct, and conduct which gives rise to a special risk of abnormal damage. Not much can be concluded from the case itself as to the links between the different categories of fault, except the possible overlap between the last two types of conduct, suggested by Lord President Hope.<sup>17</sup> There are, however, some interesting remarks that deserve to be noted about two of these categories.

First, in the case of negligent conduct, it is submitted that “the ordinary principles of the law of negligence will provide an equivalent remedy”.<sup>18</sup> The meaning of this statement is not fully clear and will be explored in section 5 below.

Secondly, about conduct creating special risk of abnormal damage, “it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result”,<sup>19</sup> and specific reference is made to Lord Justice-Clerk Moncreiff’s much-discussed dictum in *Chalmers v Dixon*.<sup>20</sup> Lord Hope mentions, then, three other cases that followed this dictum: *Edinburgh Railway Access and Property Co v John Ritchie & Co*,<sup>21</sup> *Hester v MacDonald*,<sup>22</sup> and *Noble’s Trustees v Economic Forestry (Scotland) Ltd*.<sup>23</sup> The content of these dicta will be considered for the discussion of intentional harm,<sup>24</sup> as well as for the discussion of conduct giving rise to special risk of abnormal damage in chapter 3.

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<sup>16</sup> *Kennedy* (n 3) at 99.

<sup>17</sup> *Ibid* at 100.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* at 99.

<sup>20</sup> *Chalmers v Dixon* (1876) 3 R 461 at 464.

<sup>21</sup> *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299.

<sup>22</sup> *Hester v MacDonald* 1961 SC 370.

<sup>23</sup> *Nobles Trustee’s v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

<sup>24</sup> See section 4.2.2 below.

### 2.2.2. Immediate source: Niall Whitty's "Nuisance" entry in the SME

In his treatment of nuisance, Whitty makes a fundamental distinction between intentional and negligent harm, grouping together under the first heading malicious conduct, i.e. with the purpose of causing harm (*in aemulationem*), and conduct carried out with the knowledge – actual or constructive – that harm will certainly result from it.<sup>25</sup> The relevance of this fundamental division is that, in his view, different tests operate for each category: the *plus quam tolerabile* test<sup>26</sup> applies only to intentional harm,<sup>27</sup> whereas negligent harm must be actionable according to “the general rules regulating liability for negligent conduct”.<sup>28</sup>

Recklessness is neither explained nor placed clearly in this division, but only mentioned as a form of fault and located somewhere between intention and negligence by reference to the underlying level of risk: the risk is higher than in negligence but lower than in intention.<sup>29</sup>

Conduct creating special risk of abnormal damage, which was only mentioned as a form of fault but not explained in the original entry, is discussed in the reissue and described as an “impure taxonomic category”, for it is defined by reference to a different element: the gravity of possible harm, as opposed to the mental element in the other types of conduct. Consequently, this type of conduct can overlap with the other forms of fault. The case of *Chalmers v Dixon* is mentioned simply as one of the “several judicial descriptions” of this type of conduct, but Whitty reproduces that contained in *Noble's Trustees*<sup>30, 31</sup>

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<sup>25</sup> Whitty, “Nuisance” §§ 2015 and 2016, division preserved in Whitty, “Nuisance” (reissue) §§ 105 and 106.

<sup>26</sup> Described in *Watt v Jamieson* 1954 SC 56 at 58.

<sup>27</sup> Whitty, “Nuisance” § 2105.

<sup>28</sup> *Ibid* § 2106.

<sup>29</sup> *Ibid* § 2089.

<sup>30</sup> *Noble's Trs* (n 23) at 664.

<sup>31</sup> Whitty, “Nuisance” (reissue) § 108.

### 2.2.3. Mediate source: Rest (2d)

The division in the Rest (2d) is slightly different from the framework above.

According to § 822, the invasion of another's interest in the use and enjoyment of land is either (a) intentional or (b) unintentional.

Intent, according to § 8A, denotes “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it”. Intentional invasion, therefore, includes conduct carried out for the purpose of causing that invasion and conduct carried out with the knowledge that it will result (§ 825), and it is actionable if the invasion is unreasonable according to §§ 822 and 826.

Unintentional invasion, i.e. invasion that does not fall in the previous description, is actionable if it follows from negligent, reckless or abnormally dangerous conduct, according to the general rules applicable to each of these types of conduct (§ 822(b)).

For negligent conduct, these general rules are contained in §§ 281-328D. Detailed explanation of these rules is unnecessary here, since in this aspect, the Scots model did not borrow inspiration from the American rules.

The position of reckless conduct in the Rest (2d) is clearly on the side of unintentional invasions precisely because the invasion is unintended, even though the act or omission that causes the harm is – and must be – intentional in the sense of deliberate.<sup>32</sup> But, at the same time, reckless conduct is expressly excluded from the definition of negligence.<sup>33</sup> A person's conduct is in “reckless disregard of safety of another”, according to § 500,

if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

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<sup>32</sup> Rest (2d) § 500 comments b and f.

<sup>33</sup> Ibid § 282.

Recklessness, therefore, includes two types of cases: in the first type, the wrongdoer knows or should know those facts and, realising that such risk exists, proceeds deliberately with indifference to it; in the second type, the wrongdoer knows or should know those facts, but fails to appreciate the risk and proceeds accordingly.<sup>34</sup> It can, consequently, be constructed on a double fiction: the fiction that the wrongdoer knows the facts that would lead him to realise the risk, because there are reasons for him to know even if he actually does not; and the fiction that he realises that risk exists on the basis of those facts, because a reasonable man would have such realisation, even if he actually does not.

The difference between negligence and recklessness lies essentially on the magnitude of the risk, but it is a difference in degree “so marked as to amount substantially to a difference in kind”.<sup>35</sup> The analysis developed in the Rest (2d) rests on a proportion between risk and utility: depending on the degree of disproportion, the conduct can be either negligent or reckless, or even get closer to intention, where “there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct (sic) which is intended to cause the resulting harm”.<sup>36</sup> Thus, reckless conduct takes elements both from intentional invasions and from negligent conduct: the rules for determining liability for reckless conduct are the same that apply to negligence,<sup>37</sup> but with certain exceptions that bring reckless conduct closer to intention. First, recklessness can be taken into account to determine the existence of a causal link that would not be found where the conduct is merely negligent;<sup>38</sup> secondly, the victim’s contributory negligence does not bar recovery for recklessly caused harm as it would if it were caused only negligently;<sup>39</sup> thirdly, reckless conduct might serve as justification for a punitive damages award.<sup>40</sup>

Abnormally dangerous activities, in turn, attract strict liability, according to § 519. Liability, it is stated, is neither based upon intention nor on negligence, either in carrying out the activity itself or in the way it is carried out; it is based simply upon

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<sup>34</sup> Rest (2d) § 500 comment a.

<sup>35</sup> Ibid § 500 comment g.

<sup>36</sup> Ibid § 282 comment e.

<sup>37</sup> Ibid § 501 (1).

<sup>38</sup> Ibid § 501 (2).

<sup>39</sup> Ibid § 503 (1).

<sup>40</sup> Ibid § 908 (2).

the abnormal danger it creates, whatever the level of care displayed to prevent the damage.<sup>41</sup> The determination of what is “abnormally dangerous” depends on a number of factors listed in § 520, none of which is necessarily sufficient, nor is there need for all of them to be present:<sup>42</sup> the degree of risk, the inability to eliminate the risk with reasonable care, the place where it is carried out and its social value, among others. The difference with negligence lies, again, in the contrast between utility and risk, but in this case the line is drawn where the proportion is reversed: if utility outweighs risk, negligence is conceptually excluded because, in this case, risk is not unreasonable,<sup>43</sup> but strict liability based upon abnormal danger remains open.<sup>44</sup> It is not clear how this rule is to be reconciled with the rules indicating the factors that must be taken into account to determine utility (§ 292) and risk (§ 293) for the purposes of negligence. As observed elsewhere,<sup>45</sup> there is such an overlap between these factors that the distinction between an abnormally dangerous activity and negligent conduct might be nothing more than procedural. This and other criticisms were noted by the drafters of the Rest (3d)<sup>46</sup> so that the new rules for abnormally dangerous activities exclude several of the overlapping elements – most notably, social value – and the remaining ones are considered necessary requirements (§ 20).

### 2.3. Rest (2d) and Scots model contrasted

The treatment of intentional and negligent harm in the Rest (2d) coincides largely with Whitty’s version of the model for Scots law. In both models, a broad sense of intention is adopted, including not only those consequences the defender has the purpose to bring about (henceforth, “intention as purpose”), but also those the defender knows will certainly result (henceforth, “intention as knowledge”). A further test is required to assess that harm: in the Rest (2d), the unreasonableness test; in the

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<sup>41</sup> Ibid § 510 comment d.

<sup>42</sup> Ibid § 520 comment f.

<sup>43</sup> Ibid § 291.

<sup>44</sup> Ibid § 520 comment b.

<sup>45</sup> See p 102 below.

<sup>46</sup> § 20, reporters’ note to comment k.



Scots version, the *plus quam tolerabile* test, also based on reasonableness.<sup>47</sup> Malicious conduct is, in the Rest (2d), not only intentional but also unreasonable;<sup>48</sup> whereas according to Whitty, the primary purpose of the conduct causing the invasion is one of the relevant factors taken into account to determine whether the invasion is *plus quam tolerabile*, so when this purpose is malicious, the invasion will be considered to fulfil the test.<sup>49</sup> It is possible, nevertheless, to identify some relevant differences in these models' approach to the different forms of fault.

The first difference concerns the role of malice. The Rest (2d) is clear in pointing out that for an invasion to be intentional there is no need for it to be malicious.<sup>50</sup> Malice, i.e., “the sole purpose of causing harm”, plays its role essentially in the reasonableness test.<sup>51</sup> Whitty did not draw this line so clearly. Throughout his exposition, malice is indeed defined in accordance with the Rest (2d),<sup>52</sup> but is identified as the first form of intention, namely intention as purpose. The author distinguishes, as forms of intention, malice – as the sole purpose to harm – from intention as knowledge,<sup>53</sup> and this is the distinction that is reflected in *Kennedy*,<sup>54</sup> whereas the Rest (2d) distinguishes, as forms of intention, intention as purpose from intention as knowledge, leaving malice outside the picture. Paradoxically, intention in its more obvious sense – as purpose – seems to fall through the cracks in Whitty's model. But if knowledge of certainty of harm is treated as a form of intention by the model, it is only logical that the purpose of bringing about harm must be treated accordingly.

There is a further difference in the treatment of intention. In Whitty's model, intention as knowledge includes not only the consequences that the defender actually

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<sup>47</sup> Whitty, “Nuisance” (reissue) §§ 39-41. It is possible, however, to note differences between both understandings of reasonableness: compare Rest (2d) §§ 826-828 with Lord President Cooper's formulation in *Watt v Jamieson* (n 26) at 58.

<sup>48</sup> Rest (2d) § 829 (a).

<sup>49</sup> Whitty, “Nuisance” § 2068.

<sup>50</sup> Rest (2d) § 825 comment c.

<sup>51</sup> Ibid § 829 (a).

<sup>52</sup> Whitty, “Nuisance” §§ 2069, 2089 and 2015.

<sup>53</sup> Whitty, “Nuisance” § 2087 and 2089.

<sup>54</sup> *Kennedy* (n 3) at 100 per Lord President Hope: “This may be because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm...”.

knew would result, but also those he *ought to have known* would result.<sup>55</sup> §§ 8A and 825 of the Rest (2d) and their comments, on the contrary, do not seem to incorporate those consequences which the defendant should have known would result, limiting the definition to actual knowledge. Both issues related to intention are discussed further below.<sup>56</sup>

Negligence, in contrast, receives a similar treatment in both models: in the Rest (2d) negligence is assessed according to the general rules on liability for negligence, just as it should in Scots law according to Whitty. In this point, both models resort to their own well-established systems of rules. The question about the rules applicable to negligent nuisance, however, has not been free from debate in Scots law.<sup>57</sup>

Recklessness is treated differently and certainly in more detail in the Rest (2d). As explained, reckless conduct is on the side of unintentional invasions. Apart from the particularities of the required – or imputed – knowledge and the specific level of underlying risk, determination of liability follows the rules of negligence, but some of the consequences associated with intentional invasions are attached to reckless invasions. Recklessness in the model adopted for Scots law, on the other hand, is not developed, but only listed as one of the possible forms of fault,<sup>58</sup> and placed somewhere between intention and negligence.<sup>59</sup> The precise position of recklessness with regard to the fundamental intentional/negligent harm division and their respective tests, and the different consequences possibly attached to reckless conduct – if any – are not spelled out. The point is revisited later in this chapter.<sup>60</sup>

Dangerous activities receive, at least on the surface, a different treatment. In the Rest (2d), liability for abnormally dangerous activities is based upon the creation of the relevant risk, and not on fault. There is a complex system of rules designed to determine when such risk has been created, and once this is verified, liability is strict. Conversely, conduct creating a special risk of abnormal damage is considered in the Scottish model as a form of fault. Nevertheless, in neither system are the rules clear-

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<sup>55</sup> Whitty, “Nuisance” § 2105.

<sup>56</sup> See sections 3.2 and 4.2.

<sup>57</sup> See section 5 below.

<sup>58</sup> Whitty, “Nuisance” § 2087.

<sup>59</sup> Ibid § 2089.

<sup>60</sup> See section 6.1 below.

cut. In the Rest (2d), it was pointed out that the overlap of the elements listed in § 520 for abnormal danger and the elements listed in §§ 292-293 for unreasonable risk has the consequence of blurring the distinction between strict liability and negligence, leading to a subsequent adjustment in the Rest (3d), as noted above.<sup>61</sup> In Scotland, although the orthodox view characterises the rule as fault-based, there are good reasons to argue that it is in fact a strict liability rule, as will be discussed in chapter 3.<sup>62</sup>

In sum, despite the clear inspiration found in the Rest (2d) by the model adopted in *Kennedy* from Whitty's proposal, a closer look shows that there are several differences in the way these models approach particular forms of fault or particular aspects of them. Consequently, these differences must be taken into account when looking at the Rest (2d) as a source for interpretation of the Scottish version of the model. Each of these aspects is considered in detail in the following sections.

## 2.4. Sense in which the model features a continuum

When presenting the different types of conduct causing harm, Whitty explains that there is “a *continuum* moving from intent down through recklessness to negligence”.<sup>63</sup> To explain this notion, he refers to § 8A of the Rest (2d):

All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.<sup>64</sup>

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<sup>61</sup> See p 39.

<sup>62</sup> See chapter 3 section 3.

<sup>63</sup> Whitty, “Nuisance” § 2089, italics in the original.

<sup>64</sup> Comment b.

In the reissue of his entry, Whitty added that this continuum was recognised in Scots law by *Kennedy v Glenbelle Ltd*, quoting the section of Lord President Hope’s dictum reproduced above.<sup>65</sup>

In the Rest (2d), therefore, the type of fault seemingly depends on a continuum of probability of harm, a view that has been endorsed in Scottish literature. The continuum notion is, consequently, transferred to fault itself, making the distinction between different forms of fault a matter of degree, where there are no clear demarcation lines between intentional and unintentional harm.<sup>66</sup>

The continuum model from the Rest (2d), however, seems to be more complex than its description in § 8A. The notion of continuum is revisited later in the Rest (2d), when commenting on the definition of negligence in § 282. According to this section’s comments, the difference between intention, recklessness and negligence is based upon a risk/utility ratio.<sup>67</sup> Likelihood of harm is only one element of risk; risk is the product of likelihood and extent of harm.<sup>68</sup> Consequently, it is conceivable to locate conducts “higher” in the continuum even if likelihood is rather low, when the possible harm is great in extent. Further, it should be possible to locate conducts higher in the continuum when risk is low, but utility is even lower. This more complex version of the model has not, however, been recognised in Scots law.

### 3. MALICE

One of the ways to demonstrate fault according to the continuum model adopted by Whitty and, as a consequence, by *Kennedy*, is by proving that the defender acted maliciously.

It has been discussed earlier how the notion of malice in Scots law is used in two different senses: in the sense of bad motives or spite, and in the sense of intention

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<sup>65</sup> See n 5.

<sup>66</sup> Cameron, “Neighbourhood Liability in Scotland 1850-2000” (n 1) at 150; Cameron, “Scots and English Nuisance” (n 13) at 59; F Du Bois and E Reid, “Nuisance” in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 590-591.

<sup>67</sup> Comment c.

<sup>68</sup> Rest (2d) § 822 comment k.

without spiteful motive.<sup>69</sup> It was also explained that Whitty seems to have adopted the first sense,<sup>70</sup> and this is the sense in which it is discussed in this section. Intention without malice is, in turn, addressed in the following section.<sup>71</sup>

Whitty submitted that malice is present where “the defender intends the harm to result in the sense that he knows that it is certain or substantially certain to result from his conduct, and in addition he acts with the spiteful motive of causing the harm without benefit to himself”,<sup>72</sup> asserting consistently the synonymy between malice and the Latin term *aemulatio*.<sup>73</sup>

Malicious conduct in the context of neighbour relations is, accordingly, the object of the doctrine of *aemulatio vicini*. It is not the aim of this section to discuss the doctrine in detail; it will be described only briefly and its relation with the law of nuisance will be sketched out (section 3.1). The main purpose of this section is to evaluate the position of malice as a form of fault for nuisance damages actions. It will be argued that malice in the context of nuisance, though not excluded in principle as a form of fault, has a marginal role given its practical shortcomings. Indeed, one of its few roles may be in cases where the particular invasion that resulted was not one the wrongdoer intended to cause (section 3.2).

### 3.1. The doctrine of *aemulatio vicini* and its relation with nuisance

Interferences with the use and enjoyment of land are actionable, according to the doctrine of *aemulatio vicini*, when the sole or predominant motive of the defender’s conduct is a desire to harm the pursuer,<sup>74</sup> tested objectively by the absence of any

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<sup>69</sup> See p 10 above.

<sup>70</sup> See p 40 above.

<sup>71</sup> Section 4 below.

<sup>72</sup> Whitty, “Nuisance” § 2089.

<sup>73</sup> Ibid §§ 2005, 2008, 2087, 2089 and 2104.

<sup>74</sup> Walker, *Delict* 51.

benefit for the defender.<sup>75</sup> The doctrine finds Institutional authority<sup>76</sup> as well as support in judicial dicta.<sup>77</sup>

Doubts about whether this doctrine belonged to Scots law were raised by Lord Watson's widely discussed dictum in the English case of *Mayor of Bradford v Pickles*. After questioning the foundations of Bell's recognition of the doctrine and referring to the "loose" usage of the expression *in aemulationem vicini* by Scots lawyers, Lord Watson stated that he knew

of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour. [...] The law of Scotland, if it differs in that, is in all other respects the same with the law of England. *No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.*<sup>78</sup>

Nowadays, however, there is general agreement in that at least the emphasised text is not an accurate description of the position in Scots law.<sup>79</sup> The reasons that have been advanced for this conclusion were summarised in *More v Boyle*,<sup>80</sup> a Sheriff Court decision in which *aemulatio vicini* was held to be relevant: (a) Lord Watson's observations in the *Pickles* case were *obiter*; (b) the very Lord Watson, two years before, had recognised the principle as part of Scots law in *Young & Co v Bankier Distillery Co*;<sup>81</sup> (c) his dictum is inconsistent with the principle as stated by the Institutional writers and applied by courts; and (d) the Court of Session recognised the existence of the principle and applied it in a subsequent case (*Campbell v Muir*<sup>82</sup>).

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<sup>75</sup> Whitty, "Nuisance" § 2008.

<sup>76</sup> Bankton, *Institute* 1.10.40; Kames, *Equity* 56; Erskine, *Institute* 2.2.2; Hume, *Lectures* 207-208; Bell, *Principles* §§ 964.4 and 966.

<sup>77</sup> For an enumeration of the judicial authority, see H McKechnie, "Reparation" in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 12 (1931) § 1076; and a more updated list in Whitty, "Nuisance" (reissue) § 33 n 2 and 3.

<sup>78</sup> *Mayor of Bradford v Pickles* [1895] AC 587 at 598, emphasis added.

<sup>79</sup> Walker, *Delict* 51; Whitty, "Nuisance" (reissue) § 34.

<sup>80</sup> *More v Boyle* 1967 SLT (Sh Ct) 38 at 39-40.

<sup>81</sup> *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76 at 77.

<sup>82</sup> *Campbell v Muir* 1908 SC 387.

Doctrinal recognition of the principle has also been stable,<sup>83</sup> with possibly only two exceptions. Rankine, on the one hand, challenged the soundness of the Institutional writer's explanations and questioned the doctrine's practical relevance, as "it must seldom happen that an act of enjoyment of property should be actuated solely by malice".<sup>84</sup> Mitchell, on the other hand, doubted that the doctrine belonged in Scots law, relying on Rankine's view and Lord Watson's dictum.<sup>85</sup>

The principle has been recognised as part of the law of Scotland in more recent cases, mainly interdict cases and most of them decided by the Outer House.<sup>86</sup> The principle, however, has only been recognised but not actually applied in these cases, suggesting that *aemulatio vicini* is, as it was by the time Lord Watson wrote his speech, a marginal doctrine,<sup>87</sup> although not exactly for the reasons he advanced in his dictum, as will be explained: the doctrine operates fundamentally at the margins of nuisance.

Ascertaining the relation between the doctrine of *aemulatio vicini* and the law of nuisance is not a straightforward exercise. The simple answer to this question is that they overlap: there are invasions done *in aemulationem* that cannot be characterised as nuisances; there are nuisances where the sole or predominant motive is not malicious; and there are invasions that can be described as nuisances *and* where the sole or predominant motive is malicious. In this area of overlap, therefore, we must determine how these principles interplay, whereas outside the boundaries of this overlap, each doctrine operates its own principles.

The answer provided by Whitty for the way in which these principles interplay in the overlap area is that in nuisance *aemulatio* has been absorbed by

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<sup>83</sup> Guthrie Smith, *Reparation* 380-381; Glegg, *Reparation* 258; McKechnie (n 77) §§ 1076-1078; Smith, *Short Commentary* 661. See also D Johnston, "Owners and Neighbours: from Rome to Scotland" in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995).

<sup>84</sup> Rankine, *Land-Ownership* 381-383.

<sup>85</sup> W Mitchell, "Nuisance and Non-Natural Use of Property" in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 10 (1930) § 707.

<sup>86</sup> *Logan v Wang (UK) Ltd* 1991 SLT 580 at 584; *Davidson v Kerr* 1997 Hous LR 111 at § 3-25; *Summers v Crichton* Unreported (1 December 2000) at §§ 101-105; *Canmore Housing Association Ltd v Bairnsfather (t/a B R Autos)* 2004 SLT 673 at §§ 13 and 17.

<sup>87</sup> E Reid, "Strange Gods in the Twenty-First Century: the Doctrine of *Aemulatio Vicini*" in E Reid and D Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots law* (2005) at 246.

reasonableness.<sup>88</sup> When courts assess whether a disturbance is *plus quam tolerabile*, the defender's motive can be taken into account, and if this conduct is malicious it can "tip the scales",<sup>89</sup> making actionable an invasion that would not be so were the purpose legitimate. Malice "negatives reasonableness",<sup>90</sup> as suggested in *Armistead v Bowerman*.<sup>91</sup> A recent example of this exercise can be found in *Summers v Crichton*,<sup>92</sup> where the purpose of installing a set of outside lights was considered when trying to determine whether they were substantially intrusive so as to amount to a nuisance and, therefore, whether they should be removed. Malice was one of the elements that were considered in the interference's assessment. The case, however, illustrates some of the aspects that will be discussed below, namely the evidentiary difficulty and its marginal role. Malice was considered not established, based on the defender's argument that the lights benefited him: since there had been some acts of vandalism, the lights were installed allegedly to prevent further incidents. This did not prevent the court from finding that the lights were substantially intrusive, regardless of the absence of malice.<sup>93</sup>

If malice is subsumed in the notion of reasonableness, "the distinctive role of *aemulatio vicini* [seems to be] to apply in cases where the doctrine of nuisance does not apply",<sup>94</sup> that is, outwith the overlap area. In general, it is submitted that the doctrine might find application where, rather than an invasion to the pursuer's proprietary rights, he is deprived from a benefit to which he has no express right,<sup>95</sup> or, in the words of Whitty, "extrinsic benefits enjoyed *de facto*":<sup>96</sup> an uninterrupted view, access to light or air, privacy from neighbours overlooking to one's property, and casual water percolating to such property.<sup>97</sup> Cameron argues that it would also operate where, despite proof of malice, *aemulatio* is not applicable but nuisance would be:

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<sup>88</sup> Whitty, "Nuisance" (reissue) § 70.

<sup>89</sup> Du Bois and Reid (n 66) at 585. This is also highlighted by Johnston (n 83) at 194 fn 74.

<sup>90</sup> Whitty, "Nuisance" (reissue) § 69.

<sup>91</sup> *Armistead v Bowerman* (1888) 15 R 814 at 822 per Lord Young, although malice was not found in the case.

<sup>92</sup> *Summers v Crichton* (n 86).

<sup>93</sup> *Ibid* at §§ 104-105.

<sup>94</sup> Whitty, "Nuisance" (reissue) § 34. See also Johnston (n 83) at 194 fn 74.

<sup>95</sup> Reid (n 87) at 243-244.

<sup>96</sup> Whitty, "Nuisance" (reissue) § 32.

<sup>97</sup> The contention finds support in the Institutional writers. See Bankton, *Institute* 4.45.110; and Erskine, *Institute* 2.1.2.



“where an occupier’s interest in heritable property has been invaded by an activity that cannot be classed as use of land”.<sup>98</sup> Unfortunately, we lack a case law example of this situation.

### 3.2. Malice as a form of fault in nuisance

The contention, however, that in nuisance malice has been fully absorbed by reasonableness entails denying malice’s role as a form of fault, a consequence that appears to be in conflict with the very model of fault adopted by *Kennedy*. It will be argued that although malice’s exclusion as a form of fault might be justified from a practical viewpoint, it is not excluded in principle and, moreover, there might still be (limited) room for it to operate as a relevant form of fault in nuisance.

#### 3.2.1. The practical shortcomings of malice

When the only remedy sought by the victim of a nuisance is interdict, the analysis of malice as subsumed in reasonableness is sufficient: the only consideration is whether the invasion is *plus quam tolerabile*, and malice is absorbed by this test.<sup>99</sup> Malice will be relevant when the invasion does not satisfy the “objective” factors of the test; if it does, recourse to malice is unnecessary, as it was in *Summers v Crichton*.<sup>100</sup> When the remedy sought is damages, however, proof of fault is required, and this requirement could be fulfilled by proving malice.

In the model presented by Whitty, therefore, malice serves a double function: it excludes reasonableness and it constitutes fault. The first is predicated on the invasion or interference, even if it does not affect the invasion objectively; the second, on the motive of the conduct. The consequence is that if in a given case malice is irrelevant for the first test, that is, if the test is satisfied by the invasion’s objective features, it might still be relevant for the second test, as the type of fault upon which

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<sup>98</sup> G D L Cameron, “Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss” [2001] JR 223 at 224.

<sup>99</sup> See, e.g. the English case of *Christie v Davey* [1893] 1 Ch 316 at 326-327.

<sup>100</sup> *Summers v Crichton* (n 86).

the case rests. This would mean that it is still necessary to prove malice, not to turn the invasion into an unreasonable one, but to be able to fulfil the fault requirement of the damages claim.

The most obvious practical shortcoming of malice is evidentiary. Not only does it suffer from the inherent difficulty of proving mental states, which requires resort to mostly circumstantial evidence, but also the very configuration of malice makes it difficult to prove. Malicious conduct is motivated solely or predominantly by the desire to cause harm, so it requires proof of the absence of any other motive or, alternatively, that any other motive was just incidental. Although the absence of other motive is allegedly tested objectively by the absence of benefit for the defender, in the context of property use it will be rather difficult to find such total absence.<sup>101</sup> As for the incidental character of other motives, it is difficult to see how it can be tested objectively.

But besides being difficult to prove, malice seems unnecessary, given the availability of intention as a form of fault, and especially since the model adopted a broad notion of intention. If the sole or predominant motive is harming the pursuer, and harm occurs, then one can straightaway conclude that harm was in fact intentional: the wrongdoer either acted in order to cause it or at least knew that it would result precisely because it is the reason he acted in the first place. Malicious conduct, therefore, implies that it was intentional.<sup>102</sup> If this is the case, and considering that intention is easier to prove than motives,<sup>103</sup> then “there seems no reason why pleaders would give themselves the additional burden of proving malice”.<sup>104</sup> So just as it is for the reasonableness test for invasions that are objectively *plus quam tolerabile*, malice is also unnecessary for the fault test. This conclusion, nevertheless, has a weakness.

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<sup>101</sup> See e.g. “*Corporation of Bradford v Pickles* (Note)” (1895) 7 JR 413, arguing that the defendant’s attempt at improving his bargaining position in *Mayor of Bradford v Pickles* (n 78) was enough benefit for this purpose.

<sup>102</sup> P Cane, “*Mens Rea* in Tort Law” (2000) 20 OJLS 533 at 539.

<sup>103</sup> *Ibid* at 543.

<sup>104</sup> Cameron, “Muddy Pavements” (n 98) at 224.

### 3.2.2. The limited role of malice

For the conclusion outlined above to hold, the invasion or harm to which motive and intention refer must converge. But it is possible that they do not, and here lies the conclusion's weakness: the defender might have considered causing harm to his neighbour as the sole or main motive to act, and yet not have envisaged the particular harmful consequences that ensued. I can start a fire very close to my neighbour's window only to disturb him (malice), and the particular consequence that I plan to cause or that I know will result is his house being filled with smoke to his inconvenience (intended consequence), but I do not mean to and ignore that the smoke will permanently stain his walls (unintended consequence). The issue, of course, depends on the level of generality with which we describe consequences. But in this case, strictly speaking, the particular consequence cannot be seen as covered by intention, neither in the sense of purpose nor in the sense of knowledge. A possibility of qualifying this harm as intentional would be open if we can rely upon the notion of constructive knowledge: even if I did not know that my neighbour's walls would be stained, I should have known. But the possibility of establishing knowledge constructively for the purposes of intention is at least questionable. An argument is made below<sup>105</sup> to justify the exclusion of this possibility, and if this argument is sound, then the only possibility to succeed in proving fault in a case like the described would be by proving malice.

To this situation can be added that where the invasion, absent malice, would be reasonable. For in this case, the defender will need to prove malice and it will in this case play both roles: it will turn the invasion into an unreasonable one and it will fulfil the fault requirement, as mooted in *Armistead*.<sup>106</sup>

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<sup>105</sup> See section 4.2.

<sup>106</sup> *Armistead* (n 91).

### 3.3. Conclusion

It can be concluded that malice in the context of nuisance, though absorbed by reasonableness for the purposes of assessing the invasion itself, is not, in accordance with *Kennedy*, excluded in principle as a form of fault tending to fulfil the fault requirement imposed by *RHM Bakeries*. It has, however, a marginal role in this field given its practical shortcomings: it is difficult to prove and is mostly unnecessary given the possibility that is open for the pursuer to aver and prove other – easier – forms of intention. Its main role is limited to interferences that, if malice were absent, would not amount to a nuisance and, possibly, in those cases of nuisance where the particular harm that resulted was not one the wrongdoer intended to cause.

## 4. INTENTION

The model adopted by Whitty and subsequently by *Kennedy* considered intention or intent as the second form of fault that can be alleged in an action for damages in nuisance.

This section seeks to outline the scope of this notion of intention. First, an explanation of the notion is offered, by reference to *Kennedy*, its sources, and subsequent case law (section 4.1), followed by more specific discussion of a particular aspect of the way of establishing intention: the possibility of establishing knowledge constructively. It will be argued that this possibility is problematic and should be reconsidered (section 4.2).

### 4.1. A broad notion of intention

As has been explained above, the concept of intention adopted in the model is a broad one. It was also explained that on a close reading, it seems that intention as knowledge is included, while actually intention as purpose is not. Yet it is assumed that this was not intended and, more importantly, it would be logically unsound to

hold such a view.<sup>107</sup> Consequently, this section proceeds on the assumption that both versions of intention are effective forms of fault in nuisance.

This broad notion of intention includes not only the core content covered by all notions of intention, that is, the purpose or plan to achieve the action's consequences, either as an end or as means to an end (what we have called so far "intention as purpose"), but also the knowledge of the consequences that are substantially certain to result from the action, even if not desired and only a side-effect of the conduct (what we have called so far "intention as knowledge"). This has been called "oblique"<sup>108</sup> or "indirect"<sup>109</sup> intention.

According to *Kennedy*, indeed, the requirement of *culpa* can be established when action "was deliberate in the knowledge that his action would result in harm to the other party".<sup>110</sup> This reproduces largely Whitty's description of intentional conduct: "[t]he defender has knowledge that the harm will result, or is substantially certain to result, from his otherwise lawful and even laudable conduct",<sup>111</sup> which in turn coincides with the way intention as knowledge is defined in the Rest (2d), both in general and for the purposes of nuisance.<sup>112</sup> Prosser and Keeton, commenting on the Rest (2d), identified as one of the three most basic elements of intention the fact that it "extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain".<sup>113</sup> It does not cover "mere knowledge of statistical probability where there is no certainty in the concrete instance".<sup>114</sup>

This is the form of intention that has been pleaded in cases following *Kennedy*, at least as one of the alternatives advanced to assert fault. In *Anderson v White*, the contention that the third defenders knew, because of the complaints made to them, that their actions – causing the water level of a dam to rise – were causing damage

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<sup>107</sup> See p 40 above.

<sup>108</sup> Cane (n 102) at 535.

<sup>109</sup> J Neethling and J M Potgieter, *Neethling - Potgieter - Visser Law of Delict* (7th edn, 2006) 133.

<sup>110</sup> *Kennedy* (n 3) at 100 per Lord President Hope.

<sup>111</sup> Whitty, "Nuisance" §§ 1089 and 1105.

<sup>112</sup> Rest (2d) §§ 8A and 825.

<sup>113</sup> W P Keeton (ed), *Prosser and Keeton on the Law of Torts* (5th edn, 1984) 34.

<sup>114</sup> P J Fitzgerald (ed), *Salmond on Jurisprudence* (12th edn, 1966) 370.

was considered a relevant averment of fault.<sup>115</sup> In *Powrie Castle Properties Ltd v Dundee City Council*, in turn, the knowledge of certain damage – caused by failing to waterproof a wall – was pleaded by the pursuers and admitted by the defenders.<sup>116</sup> In *Esso Petroleum Co Ltd v Scottish Ministers*, like in *Anderson*, it was held that after the first defenders were alerted by the pursuers of the existence of the nuisance – contamination by the emanation of deleterious substances from the defenders’ land – the pursuers were in a position to found upon an intentional nuisance that entitled them to an inquiry.<sup>117</sup> More recently, in the case of *Chalmers v Diageo Scotland Ltd*, the pursuers argued that “the defenders knew or ought to have known that the release of ethanol vapour from their property would be liable to cause loss”,<sup>118</sup> though the use of the word “liable” in this context hinders the determination of the particular type of fault averred, i.e. whether they were averring intention or recklessness. In the case of *Morris Amusements Ltd v Glasgow City Council*, however, the pursuers’ pleading of intention was considered short of an averment of the specific state of knowledge required by *Kennedy*.<sup>119</sup> The pursuers had been unable to aver specific knowledge on the part of the defenders about the certain or likely harmful consequences that demolition works would cause to the support of the pursuer’s building.<sup>120</sup>

As for *Kennedy* itself, it has been seen as a case of intentional nuisance as well,<sup>121</sup> but this cannot be concluded so clearly from the report. Certain paragraphs describing the pursuers’ pleadings point to the defenders’ knowledge of the certainty of the harm, while others, to their knowledge of its likelihood, so it could be understood that the fault alleged was located “towards the reckless [...] end of the intentional part of the continuum”.<sup>122</sup>

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<sup>115</sup> *Anderson v White* 2000 SLT 37 at 40.

<sup>116</sup> *Powrie Castle Properties Ltd v Dundee City Council* 2001 SCLR 146 at 150.

<sup>117</sup> *Esso Petroleum Co Ltd v Scottish Ministers* 2015 GWD 7-134; [2015] CSOH 21 at § 33. A subsequent decision in this case (*Esso Petroleum Co Ltd v Scottish Ministers* 2016 SCLR 539; [2016] CSOH 15) was only concerned with the scope of non-delegable duties of care and, therefore, did not consider the issue of intention. For a brief discussion of non-delegable duties, see chapter 3 section 2.3.1.

<sup>118</sup> *Chalmers v Diageo Scotland Ltd* 2017 GWD 9-126; [2017] CSOH 36 § 9, cond. 5.

<sup>119</sup> *Morris Amusements Ltd v Glasgow City Council* 2009 SLT 697; [2009] CSOH 84 § 46.

<sup>120</sup> *Ibid* § 35.

<sup>121</sup> Whitty, “Nuisance” (reissue) § 105; Cameron, “Scots and English Nuisance” (n 13) at 118.

<sup>122</sup> G D L Cameron, “Making Sense of Nuisance in Scots Law” (2005) 56 NILQ 236 at 262-263.

## 4.2. Constructive knowledge?

It might be questionable whether it is appropriate to extend the notion of intention so as to include knowledge of the consequences that will certainly follow from the conduct as its side effects, that is, to admit intention as knowledge as a form of fault.<sup>123</sup> This is, however, the position that *Kennedy* undoubtedly inherited from Whitty and the Rest (2d).

But Whitty's position went even further. In his view, harm is also intentional when the defender "knew, or *ought to have known*, that the invasion was certain, or substantially certain, to result from his conduct".<sup>124</sup> Knowledge, then, can be established constructively. In the words of Cameron,

[it] appears from the dicta cited above [excerpts from *Chalmers, Edinburgh Rly Access & Property Co* and *Noble's Trs* quoted by Lord Hope in *Kennedy*] that there is no need to inquire into the state of mind of the defender to determine his or her knowledge. Just as negligence is concerned with what the reasonable person in the defender's position ought to have foreseen when directing his mind to the likely consequences of his conduct, so too in this form of intentional liability, courts will impute constructive knowledge.<sup>125</sup>

This possibility is problematic for three reasons: first, it seems to conflate the mental state that constitutes intention with the way of proving it; secondly, the authority cited does not provide enough support for this contention; thirdly, and more importantly, it appears to be contrary to the fault-based liability rule enshrined by *RHM Bakeries*. Each of these problems will be addressed below.

### 4.2.1. Mental states: content and proof

Mental states entail an inherent difficulty of proof; intentions are not "directly observable".<sup>126</sup> For this reason, the pursuer is limited as to the elements upon which he can rely to prove such mental state. If the defender's own account does not help, then the pursuer is left only with inferences from the conduct and its

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<sup>123</sup> For this discussion, see p 11 above.

<sup>124</sup> Whitty, "Nuisance" § 1105.

<sup>125</sup> Cameron, "Making Sense" (n 122) at 263.

<sup>126</sup> Cane (n 102) at 542.

circumstances.<sup>127</sup> But it is a different thing to say that intention extends to the consequences that the defender ought to have known, if by this we mean what he should have known according to an objective standard. As has been said in the context of criminal law, “[i]ntention, then, is subjective, but is proved objectively”, meaning that evidence might be circumstantial but this does not turn knowledge into an objective standard.<sup>128</sup> The distinction is clearly set out by Prosser and Keeton, again commenting on the Rest (2d):

Since intent is a state of mind, it is plainly incorrect for a court to instruct a jury that an actor is presumed to intend the natural and probable consequences of the actor’s conduct; but it is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor’s state of mind was the same as a reasonable person’s state of mind would have been.<sup>129</sup>

The approach indicated by Cameron seems to extend intention from the foreseen consequences to the foreseeable consequences, and consequently objectivise knowledge, a concession that changes the nature of the concept. This “inferred intention”, in the words of Cane, “is not a frame of mind at all; rather it consists of a contextualised interpretation of what the accused did and said based on a judgment about the way people normally (ought to) behave”.<sup>130</sup>

In the context of justifying the inclusion of intention as knowledge, Cameron points to South Africa as a jurisdiction that admits it as a form of fault (*dolus eventualis*), and the point of objective knowledge is addressed. He explains that the difference between *Kennedy*’s notion of intention and the South African *dolus eventualis* is that

in the latter, knowledge of the harmful consequence must be subjective and actual. In Scotland it appears that knowledge can be treated objectively. The South African authors consider that objective knowledge belongs properly to recklessness which they equate with gross negligence.

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<sup>127</sup> Ibid; R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 28. See more generally on evidence of states of mind, M Ross and J Chalmers, *Walker and Walker The Law of Evidence in Scotland* (4th edn, 2015) §§ 7.11-7.15.

<sup>128</sup> G H Gordon, *The Criminal Law of Scotland*, vol 1 (M G A Christie ed, 3rd edn, 2000) § 7.28.

<sup>129</sup> Keeton (n 113) 36.

<sup>130</sup> P Cane, *Responsibility in Law and Morality* (2002) 47.



However, he then justifies dispensing with the requirement of actual knowledge by clarifying that Scotland did not follow South African but American law.<sup>131</sup> This is, however, a curious reason to disregard the requirement: American law – as explained<sup>132</sup> – does not admit constructive knowledge either and, moreover, objective knowledge in the Rest (2d) also belongs to recklessness, which is essentially tied to negligence,<sup>133</sup> just like it is in South African law.

The relevance of distinguishing between proving actual knowledge objectively and relying upon an objective standard of knowledge lies in the admission of ignorance as a defence. If the requirement is actual knowledge, the pursuer might be able to say that any reasonable person in the defender circumstances would have had the knowledge, and that the defender is a reasonable person, so he must have had the knowledge; but the defender can lead evidence in order to show that he is justified in his ignorance. If the requirement is just constructive knowledge, the pursuer only needs to go as far as the first statement.

Of course, one could argue that the reasons that justify ignorance can be factored into the “circumstances”, but to the extent that these reasons are exclusive to the particular defender, this entails abandoning the idea of a standard of knowledge. For instance, in a given case a reasonable person would have known that harm would result but the particular person adopted additional precautions to avoid it, precautions that turn out to be ineffective. If his constructive knowledge is determined by what a reasonable person that took those adequate precautions would have known, then we are building the “standard” to fit the particular defender. What in effect is established is his actual knowledge.

In stating that for intentional harm, knowledge could be established constructively, Cameron himself would appear to have foreseen the possibility of justified ignorance:

There is of course scope to argue that a defender did not and could not have known that a particular consequence would transpire. We do not yet have case law on this point. When the issue does emerge, as doubtless it will given time, Scots courts should avoid the English solution

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<sup>131</sup> Cameron, “Making Sense” (n 122) at 264.

<sup>132</sup> See p 40 above.

<sup>133</sup> See p 37 above.

of imposing a requirement of *reasonable foreseeability* as happened in *Cambridge Water Co v Eastern Counties Leather*,<sup>134</sup> simply because this terminology belongs properly to negligence and its use in the context of Scots nuisance will serve only to confuse the doctrines once more.<sup>135</sup>

If this statement is correct, as is consistent with the argument here advanced, then what does it mean that in intention, knowledge can be established constructively?

This must entail that it can be proved objectively.

#### 4.2.2. Scottish authority (or its absence)

The fact that the very source of the model, i.e. the Rest (2d), does not contemplate the possibility of establishing knowledge constructively would not, of course, be a sufficiently strong reason to reject the concession if support for it could be found in Scots law. But this is doubtful.

Even though *Kennedy*'s fault model is borrowed from Whitty, as quoted above<sup>136</sup> Lord President Hope's definition of intention did not include knowledge of the consequences that the defender ought to have known.<sup>137</sup> Cameron, in turn, finds support in the authorities cited by the Lord President, cases where he found the distinction between intentional and negligent harm. These cases, however, were decided in the context of dangerous activities, identifying a special treatment of fault for this type of operations, and, furthermore, the distinction made in these cases is not between intentional and negligent conduct, but between avoidable and unavoidable harm. This requires a more detailed explanation.

The line of cases begins with *Chalmers v Dixon*, where Lord Justice-Clerk Moncreiff pronounced his famous dictum in the context of an activity that was considered hazardous:

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<sup>134</sup> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

<sup>135</sup> Cameron, "Making Sense" (n 122) at 263, emphasis in the original.

<sup>136</sup> See n 110.

<sup>137</sup> The possibility was considered by the Lord Ordinary (Abernethy), *Kennedy v Glenbelle Ltd* Unreported (12 January 1995, CS348/1997/2346) at 24, yet by reference to the same authority that this section holds to be insufficient for supporting such a conclusion, in particular, the case of *Noble's Trs* (n 23): see p 59 below. I am thankful to Scott Wortley for helping me trace the Lord Ordinary's decision.

If a man puts upon his land a new combination of materials, *which he knows or ought to know*, are of dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.<sup>138</sup>

His conclusion was that “*culpa* [did] lie at the root of the matter”, but that in the case it was “not necessary to prove specific fault [as it was] necessarily implied in the result”.<sup>139</sup> Lord Moncreiff’s distinction must be understood in this light: he was arguing that, when someone engages in activity that he *knows or ought to know* that is dangerous, fault could be inferred from the fact that damage has resulted: if damage was not avoidable, then fault consisted in engaging in the activity in the first place; if it was avoidable, then fault consisted in not taking due care to avoid it.

The dictum does not seem to afford sufficient authority for the possibility of establishing knowledge constructively, in the sense of an objective standard for the purposes of pleading intention, at least not generally. Because of the context in which the dictum was pronounced, it is possible to conclude that it sought to present a regime applicable to dangerous activities.<sup>140</sup> For this reason, knowledge (actual or constructive) is considered relevant and its object is the dangerous nature of the activity. Indeed, Lord Moncreiff explains that actual knowledge of the danger is not necessary, because requiring it could introduce an arbitrary difference by virtue of which the defender who knew the dangerous nature of his activity would be liable, but the defender who ignored it would “escape liability in consequence of his ignorance”.<sup>141</sup> Even in *Kennedy* itself, reference to *Chalmers* is made, following a colon, after mentioning, and in support of, conduct giving rise to special risk of abnormal damage as a type of fault implied in the resulting damage.<sup>142</sup>

In any case, the distinction made in *Chalmers* is not coincident with the distinction between intention and negligence made both in the Rest (2d) and in Whitty’s model: in *Chalmers*’ distinction, the relevant element is the possibility of avoiding harm by the adoption of precautions, whereas the defining element that

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<sup>138</sup> *Chalmers* (n 20) at 464.

<sup>139</sup> *Ibid.*

<sup>140</sup> This is, in fact, one of the main cases cited by Whitty, “Nuisance” (reissue) § 108 when he explains conduct giving rise to special risk of abnormal damage.

<sup>141</sup> *Chalmers* (n 20) at 464.

<sup>142</sup> *Kennedy* (n 3) at 99 per Lord President Hope.

underlies the distinction in the model presented by Whitty and the Rest (2d) – in its simple version – is simply likelihood of harm. The fact that damage is unavoidable by the adoption of precautions proves, of course, that harm is certain to result, but the converse is not true. Avoidable damage can still be certain to result if the defender has actually done nothing to prevent it – and precisely because of that. Furthermore, it is not clear from the dictum which precautions are taken as a reference to draw the line between the two situations, i.e. *due* precautions or *any* precautions.<sup>143</sup> This simply reinforces the argument, because if the point of reference is *due* precautions, then harm is not even certain to result in the first type of case, since it could still be avoidable – except not by due care, but by a higher level of care. Consequently, if harm is not certain, then it can hardly be a definition of intentional harm in the sense discussed here.

In sum, it seems that the dictum in *Chalmers* cannot be understood both as supporting a special regime for particularly hazardous activities and also, at the same time, as establishing the distinction between intentional and negligent conduct, allowing “objective” knowledge to serve as the basis of intention.

In *Edinburgh Rly Access & Property Co* the distinction seems to serve a similar purpose to the one in *Chalmers*: it is used as the basis of certain inferences of fault. If the necessary or natural result of the activity is damage, then the defender is not entitled to carry out the operation; if damage is not the necessary or natural consequence but in fact happens, there is an inference of negligence.<sup>144</sup> In this case, however, reference to knowledge is omitted, so the inference seems to be based only upon the nature of the activity, which reinforces the point: we cannot use this dictum as authority for the admission of objective knowledge. Furthermore, the dictum comes from the Lord Ordinary’s judgment, which was reversed by the Inner House,<sup>145</sup> so its use as authority for any proposition seems questionable.

The distinction, however, was again reproduced in the case of *Noble’s Trs*:

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<sup>143</sup> For a discussion of this point, see p 129 and more generally chapter 3 section 4.3.1.

<sup>144</sup> *Edinburgh Rly Access & Property* (n 21) at 302.

<sup>145</sup> *Ibid* at 303.

A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour's land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations [...] if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he [...] does not take or instruct those steps. In the former case the landowner's culpa lies in the actual carrying out of his operations *in the knowledge actual or implied* of their likely consequences. In the later case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.<sup>146</sup>

Here, however, the distinction is slightly different, which indeed confirms the view of it as the basis for a special regime for dangerous activities: the consequences are no longer certain but only likely. The key element for intention, namely the knowledge of harm that is certain to result, disappears in this formulation. Consequently, what we have here is, again, not a distinction between intentional and negligent conduct but between activities where harm is or is not preventable. Therefore, the reference to "knowledge actual or implied" can hardly be understood as referring to the knowledge required for intention. *Noble's Trs* has indeed, like the previous cases, been seen as an application of the special regime for dangerous activities, in this particular case, in the form of a *presumption of intention* given the risk attached to the activity, not actual intention.<sup>147</sup>

If we understand these cases as applying a special fault regime for particularly dangerous activities, the idea of constructive or objective knowledge in the sense of a standard can be consistent with such a regime. But a general admission of such a standard is in no sense consistent with the generality of intention cases. One could argue that any case where harm is certain to result is dangerous enough to justify the application of the special regime, so the distinction is irrelevant. And it is true that there is a large area of overlap. However, these rules do not completely coincide in their scope of application, for the special regime of liability for dangerous activities is not only based on likelihood of harm, but also – and fundamentally – on a certain extent or gravity of the potential harm.<sup>148</sup> Slight – but not trivial – interferences that are certain to happen do not make an activity particularly hazardous, yet they could give place to a finding of intention if the defender knew they would happen.

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<sup>146</sup> *Noble's Trs* (n 23) at 664, emphasis added.

<sup>147</sup> J M Thomson, "Damages for Nuisance" 1997 SLT (News) 177 at 178.

<sup>148</sup> See chapter 3 sections 4.2.1 and 4.2.2.

The case of *Anderson v White* has also been referred to as authority for the proposition that actual knowledge is not necessary.<sup>149</sup> In this case, it was stated that when the pursuer avers a deliberate action,

[t]he only further requirement [is] to aver that the defenders knew that their actions would result in harm to the pursuers, or alternatively that they had no regard to the question whether their action was likely to cause such harm. The pursuers say that the defenders knew of the resultant harm because of complaints, and that in any event *the likelihood of the harm was obvious*. That, according to my understanding of the cases cited [*RHM Bakeries*, *Noble's Trs* and *Kennedy*], is sufficient to make a relevant case.<sup>150</sup>

It is quite clear that in the first sentence of the quoted dictum, the court was trying to replicate the distinction between intentional and reckless harm in the way *Kennedy* presented it. This case is probably cited to support the possibility of establishing knowledge constructively because of the emphasised phrase: the court considered that it was a relevant pleading to say that “the likelihood of the harm was obvious”. Now, it is not clear to which of the alternatives is the phrase referring, but most likely to the alternative of recklessness; it is the *likelihood* of harm which was allegedly obvious, and not the certainty of harm, so it seems that the pursuer is attempting a second option in case he fails to prove the knowledge required by intention. This displaces the question to whether the mental state described as recklessness can be established constructively, but at least for the purposes of intention, the case does not seem to support the proposition. We will come back to this question later.<sup>151</sup> More recently, in the case of *Chalmers v Diageo Scotland Ltd*, the Lord Ordinary considered that the pursuers’ averment that “the *defenders knew or ought to have known* that [their conduct] would be liable to cause loss” was enough to allow the case to go to proof.<sup>152</sup> This could be seen as allowing the establishment of knowledge constructively as long as the word “liable” is taken to mean substantial certainty, which seems to stretch the meaning of the word. Otherwise, just like in *Anderson*, the question about constructive knowledge is displaced to recklessness.

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<sup>149</sup> Cameron, “Neighbourhood Liability in Scotland 1850-2000” (n 1) at 151.

<sup>150</sup> *Anderson* (n 115) at 40, emphasis added.

<sup>151</sup> See section 6.2 below.

<sup>152</sup> *Chalmers v Diageo Scotland Ltd* (n 118) § 12.

The case of *Morris Amusements Ltd* gave the court the opportunity of deciding this particular point, for the first defenders argued that knowledge both for intention and recklessness must be actual.<sup>153</sup> But given that the pursuers did not actually aver any specific knowledge, and that for this reason the nuisance case was held to be irrelevant, the issue of whether knowledge had to be actual or could indeed be constructive was neither discussed nor decided by the court.

In conclusion, it appears that the possibility of establishing knowledge constructively does not find strong support in Scottish authority.

#### 4.2.3. Elision with strict liability?

There is, in addition, a possibly unnoticed consequence of admitting the possibility of establishing knowledge constructively: it makes liability for “intentional” harm tantamount to a form of strict liability, contrary to the rule established so clearly by *RHM Bakeries*. For in the end, the only thing that is required is that harm was foreseeable, regardless of whether the defender foresaw it.

It must be noted that the fact that foreseeability – as opposed to foresight – is enough for negligence does not mean that it should be enough for intention. What constitutes negligence is not foreseeability of harm itself, but the breach of a standard of care. In other words, it is the defender’s conduct that is assessed on the face of foreseeable harm: the level of precautions taken in engaging with an activity. In intention, on the other hand, fault is not predicated on the defender’s conduct but on his “mental disposition” while engaging in the activity. It is this mental disposition that constitutes fault. Consequently, if the only thing that is required from the defender is constructive knowledge of the harm that would certainly follow, that is, foreseeability of such harm, then effectively no mental disposition is required. Liability is based simply on that foreseeability. And that is a form of strict liability.<sup>154</sup>

It could be argued that the requirement here is different from mere foreseeability, because harm must be certain. But certainty is a separate requirement.

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<sup>153</sup> *Morris Amusement Ltd* (n 119) § 16.

<sup>154</sup> See chapter 1 section 3.2.

Foreseeability refers to the ability or possibility to anticipate harm; certainty, to the probability of its occurrence.<sup>155</sup> Certainty of harm simply defines the scope of application of the liability rule, as is typical with any strict liability rule. It will be argued in chapter 3 that particularly dangerous activities attract strict liability, and the level of danger required for the application of this liability rule is defined by the interaction of likelihood and extent of harm, among other elements.<sup>156</sup> In the rule under analysis here, certainty of harm would play a similar role: liability would be imposed by reference to a particular level of likelihood of harm. In both cases, harm must be foreseeable. It is not clear, then, why in the case of dangerous activities, we speak of strict liability, whereas in the case of certain harm, we speak of fault-based liability – more specifically, liability based on intention – in circumstances where the mental state of the defender is the same.

In sum, a construction of *Kennedy* that allows knowledge to be established constructively for the purposes of intention ends up undoing partly what *RHM Bakeries* was meant to do with nuisance: finally to establish a general fault-based liability rule and to limit special regimes of liability or proof to special circumstances. It might be that certainty of harm is a special circumstance that does in fact deserve to be treated especially, through a rule of strict liability. But disguising this as an application of the general fault-based liability rule certainly does not help the understanding of the law, nor does it promote a conceptually adequate discussion of it. Otherwise, if what is intended is to adhere rigorously to the principle enshrined in *RHM Bakeries*, only actual knowledge should be accepted for the purposes of establishing intentional nuisance.

### 4.3. Conclusion

In sum, the model adopted by *Kennedy* for intentional harm features a comprehensive notion of intention that includes both intention as purpose and intention as

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<sup>155</sup> In the context of negligence, Wilson highlights the distinction between probability and foreseeability: “A consequence can be a reasonably foreseeable consequence even although it is not a very probable consequence”. W A Wilson, *Introductory Essays on Scots law* (1978) 124.

<sup>156</sup> See chapter 3 section 4.



knowledge. The interpretation of the latter notion, however, proves problematic. Contrary to what has been argued by recent mainstream doctrinal work in Scotland, it is submitted that knowledge should actually be established; constructive knowledge is not enough. Admitting the latter as a possibility confuses the content of a mental state with its proof; it does not find adequate support in the available authority; and more importantly, it promotes an interpretation of *Kennedy* that contradicts *RHM Bakeries*, the very decision that it is trying to explain and complement.

## 5. NEGLIGENCE

Unlike in the case of intentional nuisance, the issues associated with negligent nuisance predate the decision in *Kennedy*. They crystallised when *RHM Bakeries* imposed the requirement of fault for nuisance, and *Kennedy* certainly did not help to clarify them by expressly allowing negligence to be pleaded as the relevant form of fault for a damages claim in nuisance. For when the defender has interfered negligently with the pursuer's use and enjoyment of his property, two alternatives would in principle be open for the latter: to ground his claim on (the delict of) negligence, or to ground it on nuisance and plead negligence as the required basis of fault.<sup>157</sup>

In *Kennedy*, Lord President Hope submitted that when the requirement of fault is fulfilled by demonstrating negligence, “the ordinary principles of the law of negligence will provide an equivalent remedy”.<sup>158</sup> The meaning of this statement is not entirely clear, and diverse interpretations have been offered,<sup>159</sup> but nowadays the predominant doctrinal view is that the statement must mean that where the form of fault pleaded is negligence, then the claim must be dealt with under the ordinary principles governing (the delict of) negligence.<sup>160</sup> Two main reasons are advanced for this conclusion.

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<sup>157</sup> For the distinction between the delict of negligence and negligence as a form of fault, see p 15 above.

<sup>158</sup> *Kennedy* (n 3) at 100.

<sup>159</sup> See Thomson (n 147) at 178; E Reid, “The Basis of Liability in Nuisance” [1997] JR 162 at 168; Cameron, “Muddy Pavements” (n 98) at 228-230.

<sup>160</sup> Whitty, “Nuisance” § 2106; Cameron, “Muddy Pavements” (n 98) at 228.

The first reason is that, if the claims are dealt with under nuisance rules, the *plus quam tolerabile* test that is peculiar to nuisance should be applied. This test, in turn, would not be suitable for unintentional invasions because it is conceptually incompatible with negligence and it sets a standard of care so high that it turns this allegedly negligent-based liability into strict liability, contravening *RHM Bakeries*.

The second reason is that nuisance rules would introduce unjustified differences between defenders that have negligently caused a nuisance and defenders that have negligently committed other wrongs, especially with regard to the requirements of the pleadings, the recovery of pure economic loss, liability for omissions and the relevance of the pursuer's or his property's abnormal sensitivity.

Both reasons will be addressed here. First, it will be argued that the *plus quam tolerabile* test can indeed be applied in the case of negligent nuisances (section 5.1), Secondly, it will be submitted that negligent nuisance does not introduce the alleged unjustified differences, and more generally that the highly contextual nature of negligence allows the adaptation of its different elements to the landownership context, reaching results that are consistent with those derived from negligent nuisance (section 5.2). The conclusion is that negligence can indeed be accommodated as a form of fault within the framework of nuisance.

### 5.1. The *plus quam tolerabile* test can be applied in negligent nuisance

The first suggested reason why negligent nuisances must allegedly be addressed according to the general rules governing (the delict of) negligence is that the nuisance test of reasonableness of the invasion, the *plus quam tolerabile* test, is not suitable for unintentional interferences with the use and enjoyment of property. Both of the reasons presented to justify this argument will be considered below, in order to argue that the *plus quam tolerabile* test can indeed be applied to negligent nuisances. It must be noted, however, that the practical relevance of this discussion might be rather limited, for in most cases of negligent nuisances, the type of invasion is physical harm to property<sup>161</sup> and it is thought that, at least as a general rule, invasions of this nature

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<sup>161</sup> Whitty, "Nuisance" § 2106.

meet the *plus quam tolerabile* test.<sup>162</sup> Nonetheless, the *plus quam tolerabile* test can play a role when the negligent conduct causes a non-physical interference, and very especially when economic loss follows such interference.

#### 5.1.1. Conceptual compatibility of the *plus quam tolerabile* test with negligence

Whitty argues that “the *plus quam tolerabile* test and negligence are not overlapping but mutually exclusive categories”.<sup>163</sup> This can, in his view, be appreciated from the role that the notion of risk plays on both tests: in the *plus quam tolerabile* test, the risk question is previous, not part of the test, and the requirement is (substantial) certainty; whereas in negligence, risk is a factor of the test itself. In the *plus quam tolerabile* test, reasonableness is determined regardless of risk; in negligence, reasonableness depends to a great extent on the level of risk.<sup>164</sup> A similar conceptual problem would be faced by the notion of gravity or extent of the harm as part of the *plus quam tolerabile* test: gravity of harm is one of the elements that lead to a determination of the level of risk (together with its likelihood), and negligence law sets the standard of care in accordance with such risk. Consequently, if the *plus quam tolerabile* test is applied to negligent nuisances, gravity of the harm is taken into account twice, and this, in Cameron’s view, is not appropriate.<sup>165</sup>

There is considerable force in these arguments. It is certainly true that risk is not relevant for the *plus quam tolerabile* test, because it is mostly a gravity test that assesses the invasion once it has occurred (or while it is occurring), irrespective of whether this invasion was certain to result or only more or less likely. But risk is still relevant for intentional invasions, not in assessing their gravity, but in determining whether there is fault, particularly intention as knowledge, and this is also the case in negligence. In both forms of fault, there is blame attached to the defender’s conduct in the face of a certain level of risk: carrying out his activity with the knowledge of the

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<sup>162</sup> Reid, “The Basis of Liability in Nuisance” (n 159) at 167; Whitty, “Nuisance” § 2049; Cameron, “Muddy Pavements” (n 98) at 229.

<sup>163</sup> Whitty, “Nuisance” § 2089.

<sup>164</sup> Whitty, “Nuisance” § 2106.

<sup>165</sup> Cameron, “Muddy Pavements” (n 98) at 229.

certainty of the invasion, or carrying out his activity without taking adequate precautions given the foreseeable likelihood of the invasion. In other words, the fact that the *plus quam tolerabile* test does not consider risk does not make it incompatible with negligence. Very much on the contrary, it is quite logical that it does not consider risk, for it is, as explained, mostly a gravity test, whereas risk is relevant for the different, separate, question of fault. The statement that *plus quam tolerabile* requires substantial certainty as a previous element is simply the consequence of assuming that it only applies to intention. The argument is circular.

As for the notion of gravity being taken into account twice, though it must be conceded that this is indeed the case, it must also be noted that it is not taken into account for the same purpose. The purpose of the *plus quam tolerabile* test is to exclude liability for certain invasions considered to be part of normal life in community; it actually sets a threshold of harm. In contrast, gravity of harm in negligence does not set such a threshold; negligence does not exclude in principle liability for invasions according to their extent. In practice, of course, the defender might not be liable for slight invasions simply because the standard of care in those cases must accordingly be rather low and easy to meet. But the extent of the potential harm is not the only element taken into account to determine such a standard. Both likelihood of harm as a component of risk, and considerations apart from risk (e.g. the cost of taking precautions) can raise the standard of care and make it more difficult to meet.<sup>166</sup> So in those cases, the *plus quam tolerabile* test would have a margin to perform its distinctive role excluding liability.

#### 5.1.2. Standard of care imposed by the *plus quam tolerabile* test

The second reason to reject the application of the *plus quam tolerabile* test is that it would impose too high a standard of care for unintentional invasions, lowering the threshold of liability to the point that it becomes strict, a result that explicitly

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<sup>166</sup> See p 17 above.

contravenes the ruling in *RHM Bakeries*.<sup>167</sup> “It is unfair”, holds Whitty, “to hold [the defender] liable as if he intended to inflict [the harm]”.<sup>168</sup>

It appears that this reason to reject the application of the *plus quam tolerabile* test assumes that it would be applied to unintentional invasions *instead* of the reasonable care test from negligence, and not *in addition* to it. If the only test for unintentional invasions is the *plus quam tolerabile* test, then Whitty and Cameron are right at least in the second part of the argument: liability would become strict, contravening *RHM Bakeries*. It is not clear, however, why this would impose a particularly high standard of care unless this statement is supposed to mean that, by imposing strict liability, it subjects the defender to a severe or stringent liability rule, and not that it imposes a high standard of care in a technical sense. *Plus quam tolerabile*, in fact, imposes *no* standard of care; it says nothing about the way in which the defender is expected to behave. It simply imposes a threshold of harm under which there will be no compensation.

It is arguable, however, that the *plus quam tolerabile* test is not meant to replace the reasonable care test that is peculiar to negligence as a form of fault, but to be applied in addition to it. This view is more consistent with the analysis contained in *Kennedy*: “The *plus quam tolerabile* test is peculiar to the liability in damages for nuisance. Where that test is satisfied and *culpa* is established, the requirements for the delictual liability are fulfilled”.<sup>169</sup> The two requirements are distinct and both must be fulfilled. In this light, the *plus quam tolerabile* test does not lower the threshold of liability. If anything, it raises it by excluding trivial invasions from the possibility of being compensated.

## 5.2. Nuisance does not introduce unjustified differences

The second reason why negligent nuisances must allegedly be addressed through the law governing (the delict of) negligence, “in all its glory with no shortcuts”,<sup>170</sup> is that

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<sup>167</sup> Whitty, “Nuisance” § 2089; Cameron, “Muddy Pavements” (n 98) at 230.

<sup>168</sup> Whitty, “Nuisance” § 2106.

<sup>169</sup> *Kennedy* (n 3) at 99 per Lord President Hope.

<sup>170</sup> Cameron, “Muddy Pavements” (n 98) at 227.

dealing with them under nuisance rules would introduce unjustified differences between defenders that negligently committed a nuisance and defenders that negligently committed other wrongs. Thus, it is submitted that pursuers in nuisance not only are allowed to circumvent the requirements of negligence pleadings, but can also avoid the restrictions imposed by the law of negligence to the recovery of pure economic loss and liability for omissions. In addition, it is argued that nuisance introduces a difference, this time for the benefit of pursuers in negligence, in the treatment of abnormal sensitivity of the pursuer or his property given the availability of the “egg-shell skull” rule.

In what follows, each of these aspects will be considered in order to argue that the so-called unjustified differences are not such or are indeed justified, demonstrating that the different elements of negligence adapt to the context of landownership to render results that are not different from those that can be reached through the negligent nuisance route.

#### 5.2.1. Pleadings requirements

One of the apprehensions to which the consideration of negligent nuisances in the framework of nuisance gives rise is that “the requirements of pleadings in negligence may to some extent be circumvented in a nuisance action”.<sup>171</sup> This particular formulation of the apprehension was a reaction to a proposal advanced by Thomson in his case note on *Kennedy*. In his view, the establishment of the existence of a duty of care should not be necessary in nuisance claims, because nuisance already has in place a liability control device: the *plus quam tolerabile* test. It should suffice for the pursuer to aver that “the defender’s conduct simply fell below the standard of reasonable care”.<sup>172</sup> Against this proposal, Cameron argued that, though tempting, the view misunderstands the role of the *plus quam tolerabile* test, and goes on to explain its conceptual incompatibility with negligence.<sup>173</sup>

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<sup>171</sup> Ibid at 227.

<sup>172</sup> Thomson (n 147) at 178.

<sup>173</sup> Cameron, “Muddy Pavements” (n 98) at 229.

This argument has been addressed above,<sup>174</sup> but it remains true that the duty of care in negligence and the *plus quam tolerabile* test in nuisance control liability in different ways and for different reasons. The duty of care is mostly designed to exclude potential pursuers or particular types of harm, in order to control the “floodgates” of litigation and protect defenders from what can be seen as “excessive” liability. The *plus quam tolerabile test*, on the other hand, is designed to exclude claims for reasonable invasions in the context of neighbourhood, in order to preserve a margin of “liability-free” use of property consistent with ownership. In this sense, the *plus quam tolerabile* test does not and cannot perform the same control function as duty of care.

Nevertheless, the apprehension seems overstated, for in the context of nuisance, the risks that are normally controlled by the duty of care are naturally constrained by the very limits of nuisance. On the one hand, nuisance assumes a rather close level of (physical) proximity or at least the ability to physically reach and therefore interfere with someone else’s land as a consequence of the use of one’s own. On the other hand, insofar as nuisance only protects the use and enjoyment of property, other problematic categories that are controlled by the duty of care are conceptually excluded, such as psychiatric injury or pure economic loss.<sup>175</sup>

In support of his view, Cameron refers to two cases where, in his opinion, courts showed that pursuers could not circumvent the requirements of negligence pleadings by turning to a nuisance claim. The first one is the Outer House decision in *Argyll and Clyde Health Board v Strathclyde Regional Council*,<sup>176</sup> where the relevancy of the pursuer’s pleadings of negligence was discussed. Lord McCluskey considered that the pursuer’s general averment of the water authority’s duty to take reasonable care that water mains in their ownership did not burst was irrelevant because he failed to specify what proper maintenance would have been.<sup>177</sup> This case, in Cameron’s view, supports the argument that the pleadings must be sufficient to establish (the delict of)

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<sup>174</sup> Section 5.1.

<sup>175</sup> The issue of economic loss is revisited in p 73 below.

<sup>176</sup> *Argyll & Clyde Health Board* (n 2).

<sup>177</sup> *Ibid* at 385.

negligence.<sup>178</sup> The second case is the Sheriff Court decision in *The Globe (Aberdeen) Ltd v North of Scotland Water Authority*,<sup>179</sup> where the Sheriff considered that the pursuer's averment of the water authority's duty to ascertain ground conditions before engaging in works on a sewer had no factual basis.<sup>180</sup> "The lesson", concludes Cameron, "is clear. This case is indicative of the dangers where parties seek to argue negligence without first addressing the basis upon which a duty of care arises".<sup>181</sup>

It is important to distinguish the two cases cited in support of the argument, because the inadequacy of the averments is based upon different considerations. In the *Argyll & Clyde Health Board* case, what the pursuer failed to identify was the standard of care, not the duty of care: the court did not question in principle that the water authority had the duty to maintain the pipes; the reason to hold the fault averments as irrelevant was that the pursuer did not "specify in their pleadings a system or systems of maintenance and [...] lead evidence to establish that any such system was 'proper'",<sup>182</sup> against which the defender's conduct could be judged and which the defenders could challenge. This calls for a qualification of Thomson's proposal, though arguably this qualification is implied in his formulation: it is not enough for the pursuer to aver that "the defender's conduct simply fell below the standard of reasonable care",<sup>183</sup> but he actually has to aver – and eventually prove – what this standard consists of.

*The Globe* case, on the other hand, would pose a more difficult challenge, because the reason for the irrelevancy was precisely the pursuer's failure to aver the factual basis for the duty of care. It must be noted, however, that while only this particular duty – to ascertain ground conditions – was deemed irrelevant, another duty did survive a relevancy attack: the duty "to take reasonable care to avoid causing a nuisance to neighbouring property". This could be read as an acknowledgement of a general duty of care in nuisance given the nature of the

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<sup>178</sup> Cameron, "Muddy Pavements" (n 98) at 226.

<sup>179</sup> Reported as *Cansco International Plc v North of Scotland Water Authority* 1999 SCLR 494. The decision was overturned by the Inner House on the point of exclusion of pure economic loss: *The Globe (Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392. See p 72 below.

<sup>180</sup> *Cansco International Plc v North of Scotland Water Authority* (n 179) at 499.

<sup>181</sup> Cameron, "Muddy Pavements" (n 98) at 231.

<sup>182</sup> *Argyll & Clyde Health Board* (n 2) at 384.

<sup>183</sup> See n 172 above.



context in which these disputes arise, which is consistent with the argument presented above about the lack of necessity of controlling the floodgates and excessive liability risks in this setting. But even if there is no need to establish a specific duty of care, it is still necessary to establish the standard of care and its breach.<sup>184</sup>

### 5.2.2. Recovery of economic loss

It is commonplace that the law of negligence places restrictions upon the recovery of pure economic loss. Nuisance, however, would seemingly allow these restrictions to be avoided. The point became especially prominent in the Inner House case of *The Globe (Aberdeen) Ltd v North of Scotland Water Authority*.<sup>185</sup> The pursuers were the owners of a pub and the defender was the water authority replacing a sewer outside the pub. The works, which according to the information provided by the defender were meant to last six weeks, lasted nine months. During this period, the pavement adjacent to the pub was covered in mud, and this pavement being the only access to the pub, patrons refrained from visiting it. The pursuers sued the authority in nuisance claiming, among other harms, the loss of profits caused by the drop in customers. The Sheriff considered that, on the authority of *Dynamco Ltd v Holland & Hannen & Cubitts (Scotland) Ltd*,<sup>186</sup> this was pure economic loss and the pursuers did not relevantly aver sufficient proximity between them and the defenders to this effect.<sup>187</sup> On appeal, however, the Inner House was of a different opinion. The judges “[did] not think that it can be affirmed, without careful consideration of the authorities relating to pure financial or economic loss, that in a case of alleged nuisance it is necessarily too remote to claim mere financial loss”,<sup>188</sup> and remitted the cause to the sheriff for a proof before answer.

Superficially, when contrasted with *Dynamco*, the decision in *The Globe* seems to provide an advantage to pursuers in nuisance: while in *Dynamco*, pleaded in

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<sup>184</sup> The *plus quam tolerabile* test does not “[take] the place in the nuisance action of an analysis of the existence of a duty of care *and its breach*”, as suggested by C Smith, “Scots Law of Nuisance: *Kennedy v Glenbelle Ltd*” (1995) 8 Greens Environmental Law Bulletin 4 at 5 (emphasis added).

<sup>185</sup> *The Globe* (n 179).

<sup>186</sup> *Dynamco Ltd v Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257.

<sup>187</sup> *Cansco International Plc v North of Scotland Water Authority* (n 179) at 503-504.

<sup>188</sup> *The Globe* (n 185) at 394-395 per Lord Coulsfield delivering the opinion of the Court.

negligence, liability for pure economic loss was held to be excluded in principle,<sup>189</sup> in *The Globe*, pleaded in nuisance, liability for pure economic loss was not so excluded. If pure economic loss is recoverable generally under nuisance, then the distinction between negligence and negligent nuisance indeed “becomes critical”,<sup>190</sup> because it would, once again, allow pursuers to circumvent negligence limitations by grounding their claims in nuisance.<sup>191</sup>

This contrast of *The Globe* with *Dynamco* is, however, subject to criticism. In Cameron’s view, the difference in result is not due to the fact that they were claimed in nuisance and negligence respectively, but to the nature of the harm suffered by the pursuer: while *Dynamco* was about – and remains good law for – secondary pure economic loss, i.e., economic loss derived from harm to property that does not belong to the pursuer; *The Globe* was about primary pure economic loss, namely, economic loss that is not mediated by any harm to property. As to the latter type of harm, the law of negligence has evolved and become more flexible, and the decision in *The Globe* would be a reflection of this evolution.<sup>192</sup>

A different and simpler explanation can, however, be offered: when there is nuisance, all economic loss is consequential or derivative, even if it does not derive from physical damage to property. The comfortable use and enjoyment of property is a primary interest recognised by the law of delict; interference with it is as much a damage to property as physical damage to it, so much so that it can theoretically be compensated by itself. That makes economic loss that arises as a consequence of such interference, *not* pure. It is true that some concepts of pure economic loss rely on its independence from *physical* harm to the person or property,<sup>193</sup> but this is not always the case.<sup>194</sup> In some relevant English nuisance cases of non-physical interference, economic harm has, in fact, been treated as consequential.<sup>195</sup>

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<sup>189</sup> *Dynamco* (n 186) at 267 per Lord Migdale, and 268-270 per Lord Cameron.

<sup>190</sup> E Reid, “Financial Loss and Negligent Nuisance” 2000 SLT 151 at 153.

<sup>191</sup> Whitty, “Nuisance” (reissue) § 153.

<sup>192</sup> Cameron, “Muddy Pavements” (n 98) at 231-232.

<sup>193</sup> See e.g. Thomson, *Delict* § 4.10.

<sup>194</sup> Whitty, “Nuisance” (reissue) § 153 admits the possibility for the pursuer to “recover damages for economic loss consequential on invasions of his use and enjoyment of his land where, for example, his business activities are adversely affected and loss of profits is suffered as a result of the invasions”, though he does seem to treat *The Globe* as a case of pure economic loss. See also, e.g., P Giliker, *Tort*

This also gives a consistent explanation of some previous cases: *The Globe* was not, of course, the first case where loss of business was claimed in the context of nuisance. Reid points to nineteenth and early twentieth century nuisance cases that today would probably be regarded as negligent, and where this loss was claimed with success: *Laurent v Lord Advocate*,<sup>196</sup> *Cameron v Fraser*<sup>197</sup> and *Huber v Ross*.<sup>198</sup> “Of the restrictions on recovery for financial loss, already being established in mainstream negligence, there is little sign” in these cases.<sup>199</sup> And there should not be, for there is no pure economic loss.

Accordingly, understanding economic loss in the context of nuisance as consequential or derivative provides a clear explanation for its recovery without introducing an exceptional rule to the general restrictions imposed by negligence. Pure and secondary economic loss are excluded by the very nature of nuisance as a delict that protects the use and enjoyment of property: if the origin of the economic loss suffered by the pursuer cannot be traced back to an interference with his property – physical or otherwise – then he simply does not have the possibility of claiming nuisance in the first place, showing the lack of necessity of the negligence duty of care as a control device for nuisance. For this pursuer, the only available route is (the delict of) negligence.

Moreover, it is arguable that in nuisance, recovery of economic loss, even if derivative or consequential, is limited in a way that it is not in negligence. An analysis of the nineteenth-century authority suggests that economic loss, just like non-physical interferences with the use and enjoyment of property, falls to be assessed according to nuisance principles, namely the *plus quam tolerabile* test.<sup>200</sup> Consequently, admitting the recovery of economic loss in this way does not mean that “anything which interferes with property constitutes damage”, a contention that according to the Sheriff in *The*

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(5th edn, 2014) § 3.002, defining pure economic loss as the done that “does not result from damage to the claimant’s property”, without specifically referring to physical damage.

<sup>195</sup> E.g. *Andreae v Selfridge & Co Ltd* [1938] Ch 1, a case of inconveniences caused by noise and dust, and especially *Hunter v Canary Wharf Ltd* [1997] AC 655, the well-known case of interference with television reception.

<sup>196</sup> *Laurent v Lord Advocate* (1869) 7 M 607.

<sup>197</sup> *Cameron v Fraser* (1881) 9 R 26.

<sup>198</sup> *Huber v Ross* 1912 SC 898.

<sup>199</sup> Reid, “Financial Loss and Negligent Nuisance” (n 190) at 153.

<sup>200</sup> *Ibid* at 152-153.

*Globe* “is far too widely stated”.<sup>201</sup> The Sheriff was right: not *anything*, but only interferences that are beyond what is reasonably tolerable in the neighbourhood, constitutes relevant damage for nuisance. It is arguable that reparation, construction and other legitimate operations performed in a neighbourhood might cause some acceptable inconvenience, even financial loss, to property owners, which they have to tolerate.<sup>202</sup> Nuisance, thus, is the more restrictive regime in this aspect, not negligence, and this difference is justified by the very nature of nuisance.

### 5.2.3. Liability for omissions

The third aspect in which the distinction between negligence and negligent nuisance seems to be relevant is in liability for omissions. The law of delict in general is reluctant to impose liability for pure omissions,<sup>203</sup> yet it seems that this reluctance is not so strong in the context of nuisance.

Liability for nuisances caused by negligent omissions to control a source of risk present on the defender’s land but not created by him is governed by a line of cases initiated by the House of Lords decision in the English case of *Sedleigh-Denfield v O’Callaghan*,<sup>204</sup> a case that has been consistently considered authoritative in Scotland.<sup>205</sup> During a heavy rainstorm, a pipe placed in the defendant’s land by a third party became choked with leaves, and the water overflowed onto the plaintiff’s land. The defendant was held liable for nuisance despite not having consented to or known of the presence of the pipe: he was taken to know and, based on this presumed knowledge, it was submitted that at least he continued the nuisance.<sup>206</sup> According to this decision, a landowner will be liable for a nuisance that he did not actively create if he “continues” the nuisance, that is, “if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so”; or if he “adopts” the nuisance, namely, “if he

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<sup>201</sup> *Cansco International Plc v North of Scotland Water Authority* (n 179) at 494.

<sup>202</sup> See Lord Young’s dictum in *Cameron v Fraser* (n 197) at 29.

<sup>203</sup> Reid, “The Basis of Liability in Nuisance” (n 159) at 171.

<sup>204</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880.

<sup>205</sup> See, for references to this case in Scots law, Whitty, “Nuisance” (reissue) § 98.

<sup>206</sup> *Sedleigh-Denfield* (n 204) at 897 per Lord Atkin. In Viscount Maugham’s view, he also “adopted” the nuisance: see at 895.

makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance”.<sup>207</sup> It is possible to note here a terminology shift: as Whitty points out,<sup>208</sup> the term nuisance here does not refer to the interference with the pursuer’s property but to the condition on the defender’s land that eventually causes it, that is, to the source of risk.

The decision was followed and developed further in two important cases: the Privy Council decision in the Australian case of *Goldman v Hargrave*,<sup>209</sup> and the Court of Appeal decision in the English case of *Leakey v National Trusts for Places of Historic or Natural Beauty*.<sup>210</sup> In *Goldman*, a tree located in the defendant’s land was struck by a lightning and caught fire. The defendant cut down the tree and left it to be consumed by the fire, without taking further precautions in order to extinguish it. A change on the weather conditions reignited and spread the fire to the plaintiff’s property. The court held the defendant liable, recognising the existence of a general duty upon occupiers to protect neighbours from hazards present in their land, and extending the principle advanced in *Sedleigh-Denfield* from man-made nuisances to nuisances caused by the operation of nature.<sup>211</sup> The extent of this duty, however, was said to depend on the particular circumstances of the defendant, in particular, his resources, for “the law must take account of the fact that the occupier on whom the duty is cast has, *ex hypothesi*, had this hazard thrust upon him through no seeking or fault of his own”.<sup>212</sup> This is the inception of the “measured” duty of care,<sup>213</sup> though it is more accurately described as a measured standard of care. The case was pleaded in negligence, but the possibility of the case being also classified as a nuisance was recognised – though not resolved.<sup>214</sup> A similar conclusion as to the defender’s liability, this time clearly in nuisance, was reached by the Court of Appeal in *Leakey*: the defendants were found liable for the harm caused to the plaintiffs’ houses by the

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<sup>207</sup> Ibid at 895 per Viscount Maugham.

<sup>208</sup> Whitty, “Nuisance” § 2099.

<sup>209</sup> *Goldman v Hargrave* [1967] 1 AC 645.

<sup>210</sup> *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485.

<sup>211</sup> *Goldman v Hargrave* (n 209) at 661-662.

<sup>212</sup> Ibid at 663.

<sup>213</sup> As it has been called in more recent English cases such as *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 and *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681.

<sup>214</sup> *Goldman v Hargrave* (n 209) at 656.

fall of soil from a mound located in the defendants' land. The defendants had been made aware of previous incidents and did not take the precautions that, according to the measured standard, should have taken.<sup>215</sup>

In sum, there is no limitation in principle to recovery for nuisances caused by omissions, as long as some constructive knowledge of their existence can be attributed to the landowner, and his negligence is assessed according to a measured standard of care that takes into account his circumstances, especially financial. Despite the doubts raised in Scots law about the pertinence of following *Leakey*,<sup>216</sup> there seems to be no distinction nowadays, for these purposes, between man-made and natural hazards.<sup>217</sup>

The modern formulation of the rules governing recovery for negligent omissions is contained in the House of Lords decision in *Maloco v Littlewoods Organisation Ltd*.<sup>218</sup> In this case, vandals entered into an empty former cinema that belonged to the defender and started a fire that spread and caused harm to the pursuer's neighbouring property. In an often-cited dictum, Lord Goff held that a defender could be held liable in negligence even when the immediate cause of the damage is the wrongdoing of a third party

where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer [third category]. [...] There is another basis upon which a defender may be held liable for damage to neighbouring property caused by a fire started on his (the defender's) property by the deliberate wrongdoing of a third party. This arises where he has knowledge or means of knowledge that a third party has created or is creating a risk of fire, or indeed has started a fire, on his premises, and then fails to take such steps as are reasonably open to him (in the limited sense explained by Lord Wilberforce in *Goldman v Hargrave* at pp 663-664) to prevent any such fire from damaging neighbouring property [fourth category].<sup>219</sup>

The defender was held not liable because, despite there being evidence of previous break-ins, he was neither informed nor aware of such evidence.

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<sup>215</sup> *Leakey v National Trust* (n 210) at 526-527 per Megaw LJ and 529 per Shaw LJ.

<sup>216</sup> W M Gordon, "Is Moving Land a Nuisance? New Developments South of the Border" (1980) 25 JLSS 323.

<sup>217</sup> Whitty, "Nuisance" § 2100.

<sup>218</sup> *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37.

<sup>219</sup> *Ibid* at 77-79. The first two categories are excluded here since they are not relevant for our discussion.

Lord Mackay's less reproduced (but more supported within the court) dictum relied on a different reasoning to reach the same conclusion.<sup>220</sup> In his view, liability rested on foreseeability, coupled with a requirement of high probability of harm:

what the reasonable man is bound to foresee in a case involving injury or damage by independent human agency, just as in cases where such agency plays no part, is the probable consequences of his own act or omission, but [...] in such a case, a clear basis will be required on which to assert that the injury or damage is more than a mere possibility.<sup>221</sup>

However, in the more recent case of *Mitchell v Glasgow City Council*, Lord Goff's approach was held to be preferable,<sup>222</sup> and his list of categories was considered open to further development according to the three-step duty test formulated in *Caparo Industries Plc v Dickman*.<sup>223, 224</sup>

Superficially, contrasted with *Maloco*, *Sedleigh-Denfield* seems to provide an advantage to pursuers that choose the nuisance road: in *Maloco*, pleaded in negligence, the pursuer was not successful in his claim, whereas in *Sedleigh-Denfield*, pleaded in nuisance, the plaintiff obtained compensation for the defender's omission. A brief look will reveal that there might not be a real difference in approach.

The first difference that can be identified between the cases is noted by Reid: in *Maloco*, the harm was the result of the intentional actions of third parties, whereas in *Sedleigh-Denfield*, there was nothing more than negligence on the third parties.<sup>225</sup> But more importantly, it is arguable that, unless a strict view of Lord Goff's fourth category in *Maloco* is adopted, restricted exclusively to fire, the reasoning in *Sedleigh-Denfield* and *Leakey* is perfectly consistent with the one in *Maloco*:<sup>226</sup> in *Sedleigh-Denfield* and *Leakey*, the defender knew or was deemed to know of the existence of the source of danger; in *Maloco*, the pursuers could not prove the defenders' knowledge of the existence of the source of danger. And the narrative of Lord Goff's dicta seems to allow a broad interpretation of the fourth category: he was using a fire hazard as an

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<sup>220</sup> See E Reid, "Smith v Littlewoods Organisation Ltd (1985)" in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Torts* (2010) at 261 and the assessment of both approaches at 265-266.

<sup>221</sup> *Maloco v Littlewoods Organisation Ltd* (n 218) at 68.

<sup>222</sup> *Mitchell v Glasgow City Council* 2009 SC (HL) 21; [2009] UKHL 11 at § 15 per Lord Hope.

<sup>223</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

<sup>224</sup> *Mitchell v Glasgow City Council* (n 222) §§ 21 and 25 per Lord Hope.

<sup>225</sup> Reid, "The Basis of Liability in Nuisance" (n 159) at 172.

<sup>226</sup> *Ibid* (n 159) at 173.

example for the third category and might have used fire in the fourth one just to continue with the example. The case of *Goldman* is even easier, for it actually deals with fire, so the same logic applies without the need to have a comprehensive view of the fourth category. Furthermore, the notion of measured standard of care, which could be seen as drawing a difference between negligence and nuisance, is expressly considered applicable to Lord Goff's fourth category in *Maloco*.<sup>227</sup> This demonstrates how both the duty of care and the standard of care in negligence are flexible mechanisms that adapt to the context of landownership and produce results that, in substance, are not different from those that would be reached if the matter were approached from the perspective of negligent nuisance.

More generally, while it is clear that the law of negligence imposes constraints upon the recovery of damage caused by omissions, nuisance does so too, first through the old language of continuing and adopting the nuisance from *Sedleigh-Denfield*, and now through the limits more precisely defined by knowledge of the source of danger – which also helps in setting straight the terminological shift. And these constraints seemed to have converged in Lord Goff's fourth category in *Maloco*.

In sum, the supposed difference in approach between negligence and nuisance with regard to liability for omissions is more apparent than real.

#### 5.2.4. The relevance of abnormal sensitivity

The last difference that has been identified between the rules governing negligence and negligent nuisance is their approach to the abnormal sensitivity of the pursuer or his property or use.

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<sup>227</sup> Lord Mackay also regarded the notion applicable in his framework: *Maloco v Littlewoods Organisation Ltd* (n 218) at 74.



In negligence, the defender assumes the risk of his victim's or her property's hyper-sensitivity by virtue of the so-called "egg-shell skull" rule: the negligent defender takes his victim as he finds her and is bound to compensate all harm suffered by her, even if the extent of the harm is the result of a particular vulnerability and that vulnerability is unforeseeable for him.<sup>228</sup> It has been contended that the rule would not apply to hypersensitive property,<sup>229</sup> but there is some authority supporting the contrary view<sup>230</sup> and the distinction is arguably unjustified.<sup>231</sup> Moreover, the distinction is not accepted in all jurisdictions,<sup>232</sup> so the point ultimately depends on how the rule is justified.<sup>233</sup>

Nuisance, on the contrary, disregards hypersensitivity of both the victim and her property in order to assess the gravity of the harm:<sup>234</sup> the assessment of the tolerability of the interference is performed considering the perspective of a reasonable person<sup>235</sup> or normally vulnerable property or use.<sup>236</sup>

It is important, however, to distinguish properly between the egg-shell skull rule and the disregard for hypersensitivity featured in nuisance. These are not two different answers for the same question, but answers to two different questions.

The egg-shell skull rule determines the extent of liability: if there is foreseeable harm, and provided the other requirements of negligence are met, there will be liability for the full harm, namely, the said foreseeable harm as well as any unforeseeable harm derived from the pursuer's abnormal sensitivity. In the words of

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<sup>228</sup> Walker, *Delict* 196; Reid, "The Basis of Liability in Nuisance" (n 159) at 169. See, for a fairly recent Scottish case, *Simmons v British Steel plc* 2004 SC (HL) 94; [2004] UKHL 20 at § 67.

<sup>229</sup> Thomson, *Delict* § 16.4: "It cannot be stressed enough that the thin skull rule only applies where the victim has suffered personal injuries".

<sup>230</sup> See e.g. *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, though the case was decided in a contractual context.

<sup>231</sup> See the discussion in J F Clerk and W H B Lindsell, *Clerk & Lindsell on Torts* (M A Jones and A M Dugdale eds, 21th edn, 2014) § 2-168.

<sup>232</sup> Indeed, the Rest (3rd) expressly declares that the thin skull rule applies to property: see § 31 comment d.

<sup>233</sup> For a brief discussion of the point, see P J Rowe, "The demise of the thin skull rule?" (1977) 40 MLR 377 at 381-382.

<sup>234</sup> Whitty, "Nuisance" §§ 2060-2063.

<sup>235</sup> See e.g. *Maguire v Charles McNeil Ltd* 1922 SC 174 at 191 per Lord Skerrington, and more recently *Greenline Carriers (Tayside) Ltd. v City of Dundee District Council* 1991 SLT 673 at 675-676 per Lord McCluskey delivering the opinion of the Court.

<sup>236</sup> *Armistead* (n 91) at 821 per Lord Justice-Clerk Moncreiff.

Lord Wright in *Bourhill v Young*, “[t]he question of liability is anterior to the question of the measure of the consequences which go with the liability”.<sup>237</sup>

Nuisance’s disregard of abnormal sensitivity, on the other hand, is part of the harm threshold that determines whether the defender is liable in the first place. Therefore, the presence of foreseeable harm is not enough if it falls below the *plus quam tolerabile* test; if this test is met only due to the unforeseeable abnormal sensitivity of the pursuer or his property, then the defender will neither be liable for the foreseeable nor for the unforeseeable harm. But the egg-shell skull rule does in effect apply in nuisance: if the foreseeable harm meets the *plus quam tolerabile* test, that is, if for the normally sensitive victim or property or use the interference would have been intolerable, then any further unforeseeable harm due to abnormal sensitivity will be compensated as well.<sup>238</sup>

Consequently, once it is established that the defender is liable, both in nuisance and in negligence he will have to compensate the entire harm caused, even if the extent of it is due to the hypersensitivity of the pursuer or his property or use. In this sense, part of the alleged difference is illusory: the egg-skull rule applies in both.

Furthermore, it has been suggested that in negligence abnormal sensitivity is taken into account in order to determine whether there is a duty of care. Thus, Lord Wright in *Bourhill v Young* remarked that the “question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend in a normal standard of susceptibility”.<sup>239</sup> But even if the duty stage is passed, the determination of the standard of care in accordance with foreseeable harm might end up excluding liability. Conversely, it is arguable that some hypersensitive uses could be protected in nuisance when they are in line with the character of the locality.<sup>240</sup>

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<sup>237</sup> *Bourhill v Young* 1942 SC (HL) 78 at 92.

<sup>238</sup> This is the general position in English law, based on the decision of the Privy Council on the Canadian case of *McKinnon Industries Ltd v Walker* [1951] WN 401: see e.g. J Murphy, *The Law of Nuisance* (2010) § 2.17; Giliker (n 194) § 10.010. Whitty, “Nuisance” § 2156 seems to limit it only to injury to health, following *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>239</sup> *Bourhill v Young* (n 237) at 92.

<sup>240</sup> Reid, “The Basis of Liability in Nuisance” (n 159) at 169, based on the case of *Mull Shellfish Ltd v Golden Sea Produce Ltd* 1992 SLT 703

In sum, there seems to be no relevant difference in this context between negligence and nuisance. This demonstrates once again how the elements of negligence adapt to the particular context in which they operate, producing results that are consistent with those that would follow from negligent nuisance.

### 5.3. Conclusion

The analysis just developed has showed that negligence can be accommodated as a form of fault. The *plus quam tolerabile* test that is peculiar to nuisance is neither conceptually incompatible with negligence, nor does it set too high a standard of care for unintentional invasions. Moreover, accepting negligence as a form of fault in nuisance does not introduce unjustified differences of treatment between nuisance and negligence: the differences are either justified – as in the case of economic loss – or more apparent than real, for the elements of negligence integrate factors that are specific to the landownership context. Consequently, and in accordance with *Kennedy*, negligent nuisance requires the fulfilment of two tests: *plus quam tolerabile* and breach of the appropriate standard of care.

## 6. RECKLESSNESS

Recklessness has been described as “the grey area”,<sup>241</sup> the veil under which intention and negligence shade into each other.<sup>242</sup> It has been explained in chapter 1 that recklessness is an underdeveloped notion in the context of private law.<sup>243</sup> In the particular context of nuisance, the same picture presents itself: until its identification in *Kennedy* as a separate form of fault, it seldom appeared in nuisance cases, and when it did, it was mostly in connection with negligence.

In this section, it will be argued first that *Kennedy* changed the understanding of recklessness by reducing it purely to a state of knowledge (section 6.1). Secondly, it

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<sup>241</sup> Cameron, “Scots and English Nuisance” (n 13) at 118.

<sup>242</sup> Cameron, “Neighbourhood Liability in Scotland 1850-2000” (n 1) at 150.

<sup>243</sup> See chapter 1 section 2.4.

will be argued that the notion is problematic in nuisance if it is accepted that this knowledge can be established constructively (section 6.2).

### 6.1. Recklessness in nuisance: before and after *Kennedy v Glenbelle Ltd*

As previously stated, recklessness seldom appears in cases that today we would classify as nuisances. During the nineteenth century, references to recklessness were made mainly by the pursuers in their pleadings and normally alongside negligence. For instance, in the case of *Campbell v Kennedy*, the pursuer claimed the compensation of “damage sustained [...] through the culpable carelessness or recklessness, or negligence of the defender”, caused by the bursting of a water pipe in the latter’s property.<sup>244</sup> Similarly, in *Paterson v Lindsay*, the pursuer argued that rocks reached the place where he was working “[i]n the consequence of the culpable recklessness and gross carelessness of the defender [...] in the conduct of said blasting operations”;<sup>245</sup> and in *M’Bride v Caledonian Railway Co*, the pursuers contended that the defender’s sewer construction operations “were conducted in a reckless, negligent, and unskilful manner”.<sup>246</sup> In these cases, recklessness does not seem to adopt a meaning substantially different from negligence. In other cases, however, pursuers seemed to plead recklessness in a sense closer to a mental state, especially when they had warned the defender of the possible harm, e.g. “the said operations having been conducted improperly and illegally, and in gross and wilful recklessness of the rights and interests of the pursuer”;<sup>247</sup> “notwithstanding the warnings given to him by the pursuer, and his promise to take precautions, the defender [...] wrongfully, recklessly, and in total disregard of pursuer’s interest, dragged the timber...”.<sup>248</sup>

Nevertheless, in both types of cases the courts’ reasoning was mainly focused on the precautions taken by the defender, i.e. a negligence reasoning, apart from any form of mental disposition. This is hardly surprising: in this context, intention was

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<sup>244</sup> *Campbell v Kennedy* (1864) 3 M 121 at 122.

<sup>245</sup> *Paterson v Lindsay* (1885) 13 R 261 at 262.

<sup>246</sup> *M’Bride v Caledonian Railway Co* (1894) 21 R 620 at 621.

<sup>247</sup> *Miller v Renton and Beattie & Sons* (1885) 13 R 309 at 310.

<sup>248</sup> *Armistead* (n 91) at 815.

not a requirement for liability. Consequently, as discussed in chapter 1,<sup>249</sup> there was no particular reason for a pursuer to plead recklessness if negligence sufficed.

During the twentieth century, recklessness simply disappeared from nuisance cases, until the notion was unearthed by *Kennedy*.

The immediate source of *Kennedy* – Whitty’s model – did not develop the notion of recklessness. It was, indeed, merely mentioned alongside the other categories of fault included in the Rest (2d) fault continuum, and also in a quote from the Rest (2d) explaining the continuum, where it is stated that conduct is reckless when the probability of harm is less than substantial certainty but more than mere risk.<sup>250</sup> The difference between intention, recklessness and negligence would be, therefore, simply one of likelihood of harm. Recklessness in the Rest (2d), however, is more complex than that. It is a form of fault determined by the rules of negligence that is treated, in some respects, on a par with intention given that the underlying risk is particularly high and the defendant is – actually or constructively – aware of it. It is, in sum, a judgment about the conduct coupled with a mental element, though the latter is highly objectivised.<sup>251</sup>

In *Kennedy*, the view adopted is somewhat difficult to assess. According to Lord Hope, the defender is reckless if he “had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result”.<sup>252</sup> This description seemingly coincides with the conception of recklessness discussed in chapter 1, i.e. the idea of a mental state of indifference to risk.<sup>253</sup> But on closer scrutiny, there is a considerable difference, for this disregard of risk is, after *Kennedy*, reduced to the mere knowledge of its existence. What is remarkable, however, is that *Kennedy*’s notion of recklessness, unlike the approach adopted in its sources, does not attach to a particular level of likelihood of harm. It suffices that harm is likely, as opposed to certain.

It is not clear whether *Kennedy* itself was deemed a case of reckless harm because, as mentioned above, the report points to both knowledge of certainty of the

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<sup>249</sup> See p 18 above.

<sup>250</sup> Whitty, “Nuisance” § 2089.

<sup>251</sup> See p 37 above.

<sup>252</sup> *Kennedy* (n 3) at 100.

<sup>253</sup> See p 17 above.

harm and knowledge of likelihood of harm when explaining the pursuer's pleadings.<sup>254</sup> So it is risky to draw conclusions about recklessness based on how *Kennedy* was decided when what could be under analysis is actually intention.

The literature that followed *Kennedy* does not provide much assistance either: it is limited to references to Walker's definition of recklessness,<sup>255</sup> who conceptualises it as a frame of mind of indifference to realised risks,<sup>256</sup> or references to the Rest (2d)'s explanation of the continuum quoted by Whitty;<sup>257</sup> and to the acknowledgement that recklessness is equivalent to intention,<sup>258</sup> without clarifying what consequences follow from this assimilation.

In the few cases following *Kennedy* where recklessness was in point, there are, however, some remarks that might throw light on the issue.

In *Anderson v White*, the Lord Ordinary (Philip) remarked that, since the pursuers had averred a deliberate action on the part of the defenders,

The only further requirement was to aver that the defenders knew that their actions would result in harm to the pursuers [intention], or alternatively that they had no regard to the question whether their action was likely to cause such harm [recklessness]. The pursuers say that the defenders knew of the resultant harm because of complaints, and *that in any event the likelihood of harm was obvious*. That, according to my understanding of the cases cited, is sufficient to make a relevant case.<sup>259</sup>

Consequently, to make a relevant averment of recklessness it sufficed simply to argue that the defenders were aware of the likelihood of harm. Whether the defenders were actually indifferent to or disregarded such risk did not need to be specified. One has to conclude that such indifference was inferred – though it is not clear from what (perhaps from the fact that harm occurred?).

The same alternative pleadings – intention and recklessness – can be found in the more recent case of *Morris Amusements Ltd v Glasgow City Council*. Here, the Lord Ordinary (Emslie) submitted that

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<sup>254</sup> See p 53 above.

<sup>255</sup> Walker, *Delict* 43.

<sup>256</sup> Reid, "The Basis of Liability in Nuisance" (n 159) at 168.

<sup>257</sup> Cameron, "Muddy Pavements" (n 98) at 224; Cameron, "Making Sense" (n 122) at 261.

<sup>258</sup> Thomson (n 147) at 177; Reid, "The Basis of Liability in Nuisance" (n 159) at 168; Cameron, "Making Sense" (n 122) at 262-263.

<sup>259</sup> *Anderson* (n 115) at 40, emphasis added.

[a]s explained by the Lord President in *Kennedy*, each of these alternatives requires *proof of a specific state of knowledge* on the defender's part, and on a strict technical approach it might be said that the pursuers' pleadings fall somewhat short of that requirement.<sup>260</sup>

Admittedly, these are only two Outer House decisions. But there seems to be a trend: even though *Kennedy* conceptualised recklessness as a mental state of indifference, courts have been content with treating it as a mental state of mere knowledge. Indifference is absent from the analysis, and so is any consideration of negligence. They have, however, followed *Kennedy* – and not its sources – in that they do not require a specific level of likelihood. It is enough that harm is likely, and that the defender knows it.

As a consequence, it can be established that in fact recklessness departed fundamentally from its treatment in the Rest (2d), for there is neither an assessment of the level of care taken by the defender, nor a requirement of a particularly high level of risk. In the latter aspect, the Scottish development converges with the approach adopted by the Rest (3d) in this point, where recklessness is not necessarily associated to a high level of likelihood.<sup>261</sup> But the convergence stops there, for the Rest (3d) clearly conceives recklessness as the combination of two distinct mental states: one of knowledge of risk (§ 2 (a)) and one of indifference toward risk (§ 2 (b)). The second of these mental states is inferred from the fact that adequate precautions impose a very slight burden and yet they are not adopted. Consequently, the defendant's indifference is assumed, but this assumption stems from the combination of (i) negligence and (ii) the low burden of taking precautions. This stands in sharp contrast with the decisions discussed above, where indifference is simply excluded from the analysis or, at most, assumed seemingly just from the occurrence of harm.

Recklessness is, in sum, a state of knowledge that stands as a lighter form of intention, where the difference lies simply in that the harm is no longer certain to result but only likely. This appears, at the very least, problematic. To put it simply: most of our actions entail a certain likelihood of harm, and we know it. Can we be said to be at fault just because of that? There is clearly something missing here. The

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<sup>260</sup> *Morris Amusement Ltd* (n 119) at § 46, emphasis added.

<sup>261</sup> § 2 comment e.

issue becomes all the more problematic when we consider the possibility of establishing this knowledge constructively.

## 6.2. Constructive knowledge?

On the face of it, recklessness seems like a rather attractive form of fault to be averred in practice: the only requirement is knowledge of the likelihood of harm. Indeed, the dictum from *Anderson* might suggest that recklessness is the most attractive form of fault: if the assertion that likelihood of harm *was obvious* was deemed a relevant averment of recklessness, does it mean that knowledge can be established constructively? It is not possible to find a clear and conclusive answer from either *Kennedy*'s sources or subsequent doctrine and case law, but the possibility suffers from the same problems indicated for it in relation to intention.

### 6.2.1. No clear answer provided by sources and case law

It has already been highlighted that Whitty did not develop the notion of recklessness.<sup>262</sup> The Rest (2d) considered the possibility of applying a reasonableness test to the required knowledge; but, as explained, the nature of recklessness in the Rest (2d) is strikingly different from that adopted by and developed after *Kennedy*.<sup>263</sup> For this reason, and despite it being one of the sources of the model, what makes sense in the Rest (2d) framework might not necessarily be adequate for the Scots notion, so a swift extrapolation is, to say the least, risky.

Doctrinally, as indicated, recklessness is considered as equivalent to intention, though it is not exactly clear in what respects.<sup>264</sup> If there is also equivalence in the way intention is established, then according to the current position in Scots law, we would have to conclude that knowledge, for the purposes of recklessness, can indeed be established constructively.

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<sup>262</sup> See pp 36 and 84 above.

<sup>263</sup> See pp 37 and 86 above.

<sup>264</sup> See p 85 above.



Case law is not entirely clear either, but it seems progressively more inclined to admit averments of constructive knowledge at least to allow the case to go to proof. In *Anderson*, the court considered that there were relevant pleadings of fault, and the pursuers' contention that "the likelihood of the harm was obvious" seems to be directed at proving the knowledge required for recklessness.<sup>265</sup> Now, it is not clear whether it was meant to assert that defenders knew the risk – i.e. the pursuer intended to prove actual knowledge by circumstantial evidence – or that they should have known because every reasonable defender in their position would have. Admittedly, the phrase leaves space for both interpretations. In the case of *Morris Amusements Ltd*, in turn, it was highlighted that a specific state of knowledge must be proved, but nothing is said about how this can be done.<sup>266</sup> In the more recent *Chalmers v Diageo Scotland Ltd*, however, the court regarded the assertion that "the defenders knew or ought to have known that [their conduct] would be liable to cause loss"<sup>267</sup> as a relevant averment of fault, language that more clearly points to the admission of constructive knowledge. The alleged knowledge was claimed to derive from the existence of a number of scientific papers linking the harm suffered (development of fungus on the pursuers' property) to the defenders' conduct (keeping a bonded warehouse in the vicinity).

### 6.2.2. Problems of an affirmative answer

Admitting the possibility of establishing knowledge constructively for the purposes of recklessness is, however, problematic for the same reasons indicated in relation to intention.<sup>268</sup>

First, there is the problem of confusing the content of mental states and their proof, given the particular difficulty attached to this proof. The need to resort to circumstantial evidence is not the same as applying an objective test of knowledge.

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<sup>265</sup> *Anderson* (n 115) at 40.

<sup>266</sup> *Morris Amusement Ltd* (n 119) at § 46.

<sup>267</sup> *Chalmers v Diageo Scotland Ltd* (n 118) § 12.

<sup>268</sup> See section 4.2

Secondly, there is no strong basis in authority for allowing knowledge to be established constructively, though in the case of recklessness, the cases of *Anderson* and *Chalmers v Diageo Scotland Ltd* could be seen as providing some support for it. These are, however, Outer House cases allowing proof before answer, postponing the actual decision of whether liability can be imposed on this basis. In the case of *Anderson*, this decision did not arrive and is not likely to arrive in the *Diageo* case.

More importantly, admitting this possibility, just like in the case of intention, means effectively imposing strict liability for foreseeable harm. In intention at least the scope of application of the rule is limited only to cases where harm is certain to result, whereas here, likelihood suffices, without a clear definition of how great this likelihood must be. It is, in sum, a broader strict liability rule that, again, goes against the *RHM Bakeries* rule. It could actually render negligence irrelevant: negligence, besides foreseeability of harm, requires the conduct of the defender to be in breach of the relevant standard of care, a requirement absent from the version of recklessness adopted by and developed after *Kennedy*.

Consequently, if complete consistency with the general fault-based liability rule enshrined by *RHM Bakeries* for nuisance is to be achieved, then two roads can be followed: either the basis for a recklessness averment is limited only to actual knowledge, or the notion of recklessness as a pure state of knowledge is reassessed.

### 6.3. Conclusion

From this analysis, it can be concluded that the notion of recklessness adopted by *Kennedy* for the nuisance fault model is a purely subjective one, a state of mind consisting of the knowledge that certain harm is likely to follow from the defender's conduct. It does not assess the defender's conduct objectively, nor is it associated with a particularly high level of likelihood of harm, in contrast with its counterpart in the Rest (2d). In this context, admitting the possibility of establishing knowledge constructively might lead to a broad rule of strict liability in disguise.

## 7. THE FAULT CONTINUUM IN *KENNEDY V GLENBELLE LTD*: NOT A CONTINUUM

It has been explained throughout this chapter that the fault model approved by *Kennedy v Glenbelle Ltd* was taken from Whitty's model, who in turn derived his inspiration from the American Rest (2d). Both Whitty and the Rest (2d) present this model as a "continuum" of fault that depends on the likelihood that harm will result: when harm is certain to follow from the defender's conduct, harm is characterised as intentional, and as this likelihood decreases, the invasion becomes reckless or, further, just negligent.<sup>269</sup>

It is argued in this section that this continuum is an inaccurate and misleading depiction of the fault framework: not only, according to its very logic, does it not encompass all the types of categories of fault offered by the catalogue (7.1), but also it is not truly a continuum. This clarification is not merely of theoretical importance but has practical implications for the way fault is pleaded (7.2).

### 7.1. Conceptually excluded categories

The first problem with the idea of fault as a continuum depending upon likelihood of harm is that it does not encompass all the five categories of fault offered by the *Kennedy v Glenbelle Ltd* catalogue. On the one hand, it certainly excludes some versions of intention, for malice and intention as purpose do not depend on any level of likelihood of harm; and the category of conduct causing a special risk of abnormal damage does not constitute a separate category of fault.

#### 7.1.1. Malice and intention as purpose

As a first observation, it is fairly clear why the very nature of malice and intention as purpose places them outwith the fault continuum. The reason is simply that spiteful motives and the purpose to harm have nothing to do with these concepts. What characterises these forms of fault is a mental state: the mental state of desiring certain effects (and believing they might result<sup>270</sup>), regardless of how likely these effects in fact

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<sup>269</sup> See section 2 above, especially 2.4.

<sup>270</sup> See Duff (n 127) 55-58.

are, and regardless of *why* they are so desired. The point has been conceded in Scots doctrine at least with regard to malice.<sup>271</sup>

It could be argued that, even though malice and intention as purpose are not part of the wider continuum, they are indeed in a continuum with intention as knowledge, that is, a sort of “internal” intentional harm fault continuum where malice is the graver version of intention.

It is true that these are all states of mind but, in the sense they are presented by the model under analysis, they do not represent degrees within the same hierarchy. Malice and intention as purpose, insofar as they are dominated by the purpose to cause harm (with or without spiteful motives), are mainly mental states of desire.<sup>272</sup> Intention as knowledge, on the other hand, is a mental state of pure belief.<sup>273</sup> They cannot be in a continuum from a conceptual perspective.

In sum, by definition, malice and intention as purpose do not belong in the fault continuum generally, nor do they differ only by degree from intention as knowledge.

#### 7.1.2. Conduct causing a special risk of abnormal damage

On the other extreme of the continuum lies conduct causing a special risk of abnormal damage. This category is discussed in detail in chapter 3, but some brief lines will serve to clarify its position in the continuum.

In contrast with the categories analysed above, i.e. malice and intention as purpose, this category does indeed depend to an extent on likelihood of harm, so the reason for its exclusion from the continuum is different.

As Whitty himself acknowledged,

Technically this is an impure taxonomic category because, unlike the other forms of *culpa* which form a series or continuum of types of conduct defined by reference to the pursuer's

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<sup>271</sup> Cameron, “Muddy Pavements” (n 98) at 223.

<sup>272</sup> See, however, Fitzgerald (n 114) at 369, distinguishing intention and desire.

<sup>273</sup> The issue of the independence of mental states of desire and mental states of belief is further explored by K W Simons, “Rethinking Mental States” (1992) 72 Boston U LR 463 at 476-482.

mental element, this has reference to the gravity of the possible harm suffered by the defender not to the pursuer's mental element and therefore belongs to a different classificatory series.<sup>274</sup>

Whitty's explanation must be qualified, for not *all* the other categories are defined by reference to the mental element. More accurately, it can be said that the other categories assess certain elements of the defender's behaviour on the face of a certain risk – his mental state or the precautions taken by him – whereas conduct causing a special risk of abnormal damage attributes liability regardless of these elements.

Furthermore, the continuum depends solely on likelihood of harm, whereas conduct creating a special risk of abnormal damage depends on a certain interaction between likelihood of harm and its magnitude, so it cannot be located in a specific place within the spectrum, despite the intuition that, given the level of risk that is required, it should be “near the top rather than the bottom end of the continuum”.<sup>275</sup> It could, in a given case, require a lower level of likelihood than one would expect where the potential consequences are devastating.

Consequently, conduct creating a special risk of abnormal damage can overlap with the other categories of the continuum. It is not a different category of fault but actually, as argued in chapter 3, a form of strict liability.

## 7.2. Intention as knowledge and negligence: difference in nature, not in degree

Is it possible to affirm that there is a continuum of fault encompassing the remaining categories, that is, intention as knowledge, recklessness and negligence?

The idea of the continuum of fault rests upon the notion of a continuum of likelihood of harm, by virtue of which different degrees of fault are attached to different degrees of likelihood. Therefore, there is a continuum “transfer”: from the fact that there is a continuum of risk based on the likelihood of harm, we conclude that there is a continuum of fault. The argument suggested here is that this transfer is improper for two reasons: firstly, because even if there is a continuum of risk, fault is

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<sup>274</sup> Whitty, “Nuisance” (reissue) § 108.

<sup>275</sup> Du Bois and Reid (n 66) at 590.

not the materialisation of such risk; secondly, because the different types of fault are not all necessarily attached to a particular level of risk. Consequently, there is no such fault continuum.

This conclusion is relevant because the continuum notion seems to suggest two misleading consequences that have practical importance. It suggests, firstly, that a claimant could rely upon the “lighter” form of fault if he cannot prove the “heavier”, i.e. if he cannot prove certainty of harm, it would be enough for him to prove its likelihood. In fact, merely proving likelihood would not suffice, because he would also need to aver and prove the rest of the elements that constitute the lighter form of fault. The second consequence would be that the level of risk predetermines the type of fault that pursuers are supposed to plead: if harm was certain, there is only room for a case of intention; if harm was only likely, there is only room for a case of negligence. Yet, as will be explained, only the latter is true.

To facilitate the argument, the contrast between intention and negligence will be addressed in order to locate recklessness within the framework.

#### 7.2.1. Fault is not the materialisation of the risk

Assuming that there is in fact an underlying continuum of risk, based on the likelihood of harm, to which each type of conduct is attached, materialisation of such risk is not *per se* sufficient to be the basis of liability. What constitutes fault is not the fact that harm happened, whether it was certain or just likely; risk is not the *defining* element but only the underlying element. In intention as knowledge, what constitutes fault is acting with the knowledge that harm will result, so the focus is on *knowledge*, that is, a mental state towards consequences; in negligence, fault is not taking due care, so focus is on *conduct*, that is, whether it complies with a certain standard or not. As explained by Simons in the context of American law (the source of our continuum), they do not belong in the same hierarchy of culpability: intention in this version belongs in the hierarchy of mental states of belief, whereas negligence belongs in a hierarchy that is not of mental states, but of standards of conduct.<sup>276</sup>

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<sup>276</sup> Simons (n 273) at 464-465.

This is why a pursuer cannot simply rely on the lighter form of fault if he fails to prove the level of certainty required by the more serious one, unless his fall-back position includes the elements of the former that actually constitute fault. The best illustration of the difference can, in fact, be noted in the very case of *Kennedy v Glenbelle*. In the case, the pursuers tried two different basis of liability for the same “likelihood” of harm: intentional – or perhaps reckless – nuisance (art 9 of the condescendence) and “fault” (art 10 of the condescendence). About this second plea, Lord President Hope stated:

[I]t is averred that the second defenders knew that the execution of the works “was likely” to cause damage to the pursuers’ premises of the kind which in fact occurred, and that it was the second defenders’ duty not to instruct and direct the carrying out of these works. If what is meant by these averments is that the second defenders knew that damage would inevitably result from the carrying out of the works, which is what the pursuers say in the preceding articles of the condescendence, then this seems to me to be a repetition of the case of nuisance which is pled in art 9. If it is being suggested that the damage was likely in the sense that, if due care had been taken, it might have been prevented, then the suggestion is that the second defenders were negligent. *But the pleadings in art 10 are wholly inadequate to support a case based on negligence [...]*.<sup>277</sup>

This difference in nature is, indeed, the explanation for the irrelevance of the degree of care employed in the case of intentional harm;<sup>278</sup> there is simply “no room for arguments based in the absence of negligence”<sup>279</sup> because care is not at issue. This is, moreover, the reason why speaking of a “standard of care” in intentional wrongdoing is technically incorrect: we do not have here an “absolute”<sup>280</sup> or “higher”<sup>281</sup> standard of care, as it has been suggested, because care is not under scrutiny when the type of fault asserted is intention.

### 7.2.2. Fault is not predetermined by the level of risk

Furthermore, the risk continuum does not determine in an inescapable way the type of fault the pursuer has to plead, at least not in both ends of the spectrum.

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<sup>277</sup> *Kennedy* (n 3) at 102, emphasis added.

<sup>278</sup> Du Bois and Reid (n 66) at 592; Cameron, “Muddy Pavements” (n 98) at 229.

<sup>279</sup> Thomson (n 147) at 178.

<sup>280</sup> Walker, *Delict* 166.

<sup>281</sup> Whitty, “Nuisance” (reissue) § 95.

The fact that certainty of harm serves as the basis for the assertion of intention as knowledge does not exclude the possibility of the conduct of the defender being negligent if he did not meet the standard of care that the circumstances required him to meet.<sup>282</sup> Thus, it would be possible to plead negligence when harm was certain and even actually intentional;<sup>283</sup> liability criteria are “nested”.<sup>284</sup> The pursuer might want to choose this road for two reasons: because even if harm is certain, the defender might not have known it was, which excludes intention; or because despite the fact that the defender knew, negligence might be easier to prove. The standard of care for negligence may and probably will be very high in the face of certain harm and, consequently, its breach will be easier to establish. This is the only sense in which speaking of a standard of care for intentional wrongdoing is possible: when harm is in fact intentional but the type of fault pleaded is not intention, but negligence.

The converse, however, is not true: intention as knowledge cannot be established on the face of mere likelihood of harm. If harm is simply probable, but not certain, only the road of negligence is open. Therefore, the degree of likelihood only determines the type of fault that can be pleaded in one direction, not in both.

### 7.3. The position of recklessness

It has been argued above that the developments since *Kennedy* have seemingly reduced recklessness to a mental state of pure knowledge of the likelihood of harm, disregarding – or at best, assuming – the element of indifference that characterised the notion in its traditional understanding.<sup>285</sup> If one adopts this view, then it is arguable that recklessness is in a continuum with intention as knowledge, as a “lighter” form of fault. Where likelihood of harm turns into certainty of harm, recklessness turns into intention.

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<sup>282</sup> A R White, “Carelessness, Indifference and Recklessness” (1961) 24 MLR 592 at 592, although he considers this consequence of the objective notion of negligence as a “logical absurdity”.

<sup>283</sup> Cane, “*Mens Rea* in Tort Law” (n 102) at 537; the incompatibility identified by Fitzgerald (n 114) 380 stems from the fact that he considers negligence to be a “mental attitude”.

<sup>284</sup> Cane, *Responsibility* (n 130) 88.

<sup>285</sup> See section 6.1 above.



This notion of recklessness, however, does not rely on a particular level of likelihood of harm. Accordingly, it simply cannot be in a continuum with negligence: they can actually be both attached to the same level of likelihood. Moreover, this notion of recklessness differs from negligence in nature, not in degree, for these forms of fault entail an assessment of different elements of the defender's act or omission, just like intention as knowledge differed from negligence.<sup>286</sup>

As a consequence, this version of recklessness seems to be the final nail in the coffin for the continuum notion.

#### 7.4. Conclusion

This analysis shows that the notion of continuum does not accurately describe the fault framework adopted for nuisance by *Kennedy*. On the one hand, the concept that underlies the so-called continuum, namely likelihood of harm, conceptually excludes some of the forms of fault: malice and intention as purpose, insofar as they simply do not depend on any notion of likelihood; and conduct creating a special risk of abnormal damage, for it depends on a notion that is more complex than mere likelihood, and it does not constitute a separate form of fault but actually a form of strict liability. On the other hand, the notion of a continuum suggests that fault is simply the materialisation of a risk and, more importantly, that the level of likelihood predetermines the type of fault that can be pleaded by the pursuer yet both of these suggestions are misleading. Perhaps only recklessness – in the rather problematic version adopted after *Kennedy* – and intention as knowledge can be understood as differing in degree rather than in nature, but in general, it seems better suited to analyse each form of fault separately rather than try to find a unifying concept that might lead to a misunderstanding of the nature of the different categories.

### 8. CHAPTER CONCLUSIONS

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<sup>286</sup> See section 7.2 above.

The arrival of the *Kennedy v Glenbelle Ltd* model of fault in the Scots law of nuisance cannot be regarded simply as a rationalisation of the law already in place. It entailed the partial adoption of a foreign model that still requires to be clarified and adapted to its new environment. This chapter contributed to this task by analysing and evaluating the four forms of fault offered by the model, as well as the notion that seeks to explain the relation between them.

Regarding the first form of fault offered by *Kennedy*, malice, its role appears very limited. In nuisance, malice or *aemulatio* has been absorbed mostly by the *plus quam tolerabile* test. As a form of fault, it has practical shortcomings that restrain its utility, although it is possible to envisage a case where the only possibility of establishing nuisance would be by averring and proving malice: where the defender had as the sole purpose of his actions to cause harm to the pursuer but the particular harmful consequence was unintended.

The second form of fault, intention, is particularly challenging. The model admits as forms of intention both having the purpose of bringing about particular consequences and having the knowledge that those consequences will certainly follow. Scholars have submitted that, for the purposes of the latter form of intention, constructive knowledge is enough. But this contention is conceptually problematic and is not adequately supported in the authority. Moreover, this interpretation creates the undesired result of contradicting the decision of *RHM Bakeries*, by imposing what is in effect a form of strict liability.

The third form of fault, negligence, has been the subject of more debate: for different reasons, it has been seen as a form of fault that does not fit the nuisance framework, so negligent nuisance should be treated simply as negligence and attract the application of the general rules of the law of negligence. It was argued here, however, that this is not necessarily the case, and that negligence can be accommodated as a form of fault in the nuisance model. The *plus quam tolerabile* test can interact adequately with the reasonable care test that is characteristic of negligence, and addressing negligent nuisance in the context of nuisance does not allow pursuers to avoid the restrictions that negligence is traditionally seen to impose.

Recklessness is the fourth and less developed form of fault that is offered by the model. Departing from what seems to have been the understanding of recklessness in

Scots law, the notion has evolved into a mental state of pure knowledge that is not only problematic in itself, but also replicates the issues identified in intention related to the possibility of establishing knowledge constructively, with potentially wider consequences, as the requirement is not certainty but just likelihood of harm.

Overall, explaining the links between these forms of fault through the notion of continuum is unhelpful and even misleading. The notion, based on different degrees of likelihood, excludes conceptually some of the forms of fault here analysed, specifically malice, intention as purpose, and conduct causing a special risk of abnormal damage. Further, it presents the remaining forms of fault as differing only in degree, a contention that only makes sense if we understand fault simply as the materialisation of the underlying risk, which is not the case; and suggests that the level of likelihood determines conclusively the type of fault that the pursuer can plead as the basis of his claim, which is not always the case. Besides the relation between intention as knowledge and recklessness, which comes closer to this idea of continuum, it is better to consider each category individually: forcing them into a single concept confuses rather than clarifies.

### 3 Abnormally dangerous conduct

#### 1. INTRODUCTION

The previous chapter discussed the first four categories of fault listed by Lord President Hope in *Kennedy v Glenbelle Ltd* in addressing the basis of liability in nuisance.<sup>1</sup> This chapter is concerned with the fifth and last of these categories, namely “conduct causing a special risk of abnormal damage, where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result”. The formulation discloses from the outset that this type of conduct is subject to a special treatment or regime that departs from the other four categories: instances of malice, intention, recklessness or negligence must be proved by the pursuer in order to obtain compensation, whereas in the case of conduct that meets the abovementioned description, there is no need to prove a specific fault, for it is implied.

Neither the scope of this category nor the nature of the liability that it attracts have been satisfactorily explained by Scots case law and doctrine. In the words of Cameron, “it may be that this element of fault requires to be more fully worked out”.<sup>2</sup> The aim of this chapter is, therefore, to contribute to the analysis of this special liability regime by explaining some of the difficulties that are present in the law as it stands and by exploring the possibilities for a more rational approach that would allow the law to move forward.

A discussion of the sources of this category and subsequent case law and literature will reveal difficulties for the adequate delineation and explanation of this regime of liability, for three reasons. First, the sources lead to different and, on occasions, conflicting views about the category. Secondly, most of these sources remain directly or indirectly connected to the English case of *Rylands v Fletcher*,<sup>3</sup> which was excluded from Scots law in the House of Lords decision in *RHM Bakeries*

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<sup>1</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95 at 99.

<sup>2</sup> G D L Cameron, “Neighbourhood Liability in Scotland 1850-2000” in J Gordley (ed), *The Development of Liability between Neighbours* (2010) at 151.

<sup>3</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

(*Scotland*) *Ltd v Strathclyde Regional Council*.<sup>4</sup> Thirdly, much of the more recent relevant authority is concerned with the application of a connected yet different liability rule: that applicable to the employer for damage caused by independent contractors. Despite these issues, at least one feature of Scottish doctrine as it has evolved appears to be uncontentious: the regime can be explained in fault terms. Precisely for this reason, the need to delineate with precision the scope of this regime is downplayed (section 2).

Two main arguments will be advanced in this chapter. First, it will be argued that despite the current orthodox view that explains this liability regime as fault-based, the rule is effectively one of strict liability. This conclusion is reached by the evaluation of the rule's elements and the discussion of the shortcomings of the orthodox fault-based account (section 3). Secondly, it will be argued that, given the strict nature of the liability rule, the precise delineation of its scope becomes critical and should be the main focus of inquiry. Since the available authority does not provide enough substantive assistance in elucidating this delineation, a rational proposal to fill this gap is offered here. This proposal sets out the conduct's elements, their interaction and restrictions, taking special account of the strict liability nature of the rule (section 4).

## 2. CONDUCT CAUSING A SPECIAL RISK OF ABNORMAL DAMAGE: SOURCES AND SUBSEQUENT CASE LAW

This section considers firstly two groups of materials that serve as the sources for the category of conduct causing a special risk of abnormal damage: those that constitute the source for the fault model generally, i.e. Whitty's "Nuisance" entry and the authority there considered (section 2.1); and the dicta in *Kennedy v Glenbelle Ltd* itself together with the authority identified in the decision for the specific category under discussion (section 2.2). A third group of materials is considered subsequently: case law and legal literature after *Kennedy* (section 2.3).

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<sup>4</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

In these three groups of materials, both key aspects of the liability regime will be considered, i.e. the nature of the liability rule – whether fault-based, “stricter-than-normal” or strict, according to the taxonomy set out in chapter 1 – and its scope of application – that is, the definition of the category of conducts to which it applies.

## 2.1. The sources of the category (1): Whitty’s “Nuisance” entry in the SME

The first source of the category under discussion considered by Lord President Hope in *Kennedy* was paragraph 2087 of Whitty’s “Nuisance” entry in the SME,<sup>5</sup> which is the introductory paragraph to the section about the basis of liability in reparation. Here, the author sets out the fault model or “continuum” based on the American Rest (2d), discussed in detail in chapter 2. According to this model, the “usual categories of *culpa*” are malice, intent, recklessness, negligence, and “conduct causing a special risk of abnormal danger”.<sup>6</sup> It should be noted that Whitty refers here to abnormal *danger*, and not to abnormal *damage* as in Lord Hope’s formulation, a point that will be revisited below.<sup>7</sup> The only authority cited in support of the last category is the case of *Miller v Robert Addie & Sons’ Collieries Ltd*,<sup>8</sup> which in turn applied the rule developed by the Privy Council in the Australian case of *Rickards v Lothian*.<sup>9</sup>

### 2.1.1. Whitty’s model and Rest (2d) contrasted

Even though the fault model adopted by Whitty is derived from the Rest (2d), by incorporating the type of conduct under discussion into the fault framework he departed conceptually from this source, where abnormally dangerous activities are subject to a strict liability rule.<sup>10</sup> This departure, however, is fundamental to the

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<sup>5</sup> Whitty, “Nuisance”. A reissue of this entry was released subsequently: see Whitty, “Nuisance” (reissue). Paragraph numbers in both versions are correlative: § 2087 in “Nuisance” corresponds with § 87 in “Nuisance” (reissue). This section on the sources of the category is, however, mostly concerned with the original version.

<sup>6</sup> Whitty, “Nuisance” § 2087.

<sup>7</sup> See p 125.

<sup>8</sup> *Miller v Robert Addie & Sons’ Collieries Ltd* 1934 SC 150.

<sup>9</sup> *Rickards v Lothian* [1913] AC 263.

<sup>10</sup> Rest (2d) § 519.

nature of the applicable liability rule, i.e. fault-based as opposed to strict liability. The delimitation of the conduct itself in the Rest (2d), however, could still be illustrative for our purposes, since it seems to have informed the way in which Whitty defined the conduct by incorporating the notion of *abnormal danger*. Consequently, even though this type of conduct falls within a different liability regime, the Rest (2d) nevertheless serves as a relevant point of reference.

Abnormally dangerous activity is defined in § 520 Rest (2d), which lists a number of factors that must be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

According to the Rest (2d), none of these factors is necessarily sufficient of itself, and normally several of them will be required, to characterise an activity as abnormally dangerous, but they do not need all to be present. For this reason, “it is not possible to reduce abnormally dangerous activities to any definition”.<sup>11</sup>

This approach was considered problematical in several ways,<sup>12</sup> especially due to the difficulty in separating clearly activities that trigger the application of strict liability from those that are subject to the general fault-based liability regime. The difference, in this model, lies in the contrast between utility and risk. If utility outweighs risk, then risk is reasonable and negligence is conceptually excluded, for negligence can only arise from unreasonable risks,<sup>13</sup> but there is still space for strict liability based upon abnormal danger.<sup>14</sup> Conversely, if risk outweighs utility, then risk is unreasonable and, therefore, conduct can be negligent. This, however, should not close the possibility of strict liability; otherwise, it could create the contradiction that a higher risk that is not outweighed by its utility would be excluded from the category of abnormal danger and liability would only depend on proof of negligence.

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<sup>11</sup> Rest (2d) § 520 comment f.

<sup>12</sup> Details of the problems associated to the application of these factors can be found in the reporter’s notes of § 20 Rest (3d).

<sup>13</sup> Rest (2d) § 291.

<sup>14</sup> Rest (2d) § 520 comment b.

It seems, therefore, that unreasonable risk, unlike abnormal danger, is a relational concept: risk can be reasonable because of the activity's utility, but still so high as to be abnormal; risk can be low so not enough to be abnormal, but still unreasonable if the activity's utility is even lower.<sup>15</sup> The inclusion of some factors in § 520, however, undermines this conclusion, e.g. value to the community is itself an indicator of utility for negligence purposes.<sup>16</sup> There is, in fact, a wide overlap between the factors that are taken into account to characterise an activity as abnormally dangerous and the factors taken into account to characterise risk as unreasonable,<sup>17</sup> so one is left to wonder whether in practice these tests have any substantial difference and whether they can in fact bring about different results. It has, indeed, been submitted that "when a court applies all the factors suggested in the Second Restatement it is doing virtually the same thing as is done with the negligence concept".<sup>18</sup> The Rest (2d) highlights a procedural difference: weighing factors that define an activity as abnormally dangerous is a task for the court; weighing factors that characterise risk as unreasonable is a task for the jury.<sup>19</sup> Substantively, however, there seems to be little difference.

It will be possible to note from the authority analysed below that some of the factors considered in the Rest (2d) have been identified as relevant in Scots law. For example, the inability to eliminate risk lies at the heart of the distinction drawn in the case of *Chalmers v Dixon*;<sup>20</sup> and the ideas of common usage and value for the community could be seen as the basis for the decision in *Miller v Robert Addie*.<sup>21</sup> Yet the fact that none of the factors is treated as necessarily decisive in the Rest (2d) constitutes a fundamental difference with the Scots approach. For instance, under § 520, activities that would inexorably fall in Scots law under the general rules of fault-based liability according to *Miller*<sup>22</sup> for being common uses of land or uses for the

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<sup>15</sup> Rest (2d) § 520 comment g.

<sup>16</sup> Rest (2d) § 292 (a).

<sup>17</sup> Compare factors in § 520 with factors in §§ 291-293.

<sup>18</sup> W P Keeton (ed), *Prosser and Keeton on the Law of Torts* (5th edn, 1984) 555; see also E Reid, "Liability for Dangerous Activities: A Comparative Analysis" (1999) 48 ICLQ 731 at 737.

<sup>19</sup> Rest (2d) § 520 comment l.

<sup>20</sup> *Chalmers v Dixon* (1876) 3 R 461 at 464 per Lord Justice-Clerk Moncreiff.

<sup>21</sup> *Miller v Robert Addie* (n 8).

<sup>22</sup> Discussed in the following section.



general benefit of the community, could still be considered as abnormally dangerous in the Rest (2d) if other elements are strong enough, as in the case where it is extremely likely that damage will follow from the activity and no precautions would control such risk. Consequently, the Rest (2d)'s flexible approach to the definition of abnormally dangerous activities stands in contrast with the sources considered by Whitty in defining conduct causing a special risk of abnormal danger.<sup>23</sup> It seems, therefore, that the inspiration obtained by Whitty from the Rest (2d) in this point did not go beyond the incorporation of the “abnormal danger” wording.

### 2.1.2. *Miller v Robert Addie*, its sources and aftermath

We turn, then, to the only authority cited by Whitty in support of the category of conduct causing a special risk of abnormal danger: the case of *Miller v Robert Addie*.<sup>24</sup> This decision, paradoxically, did not apply any special liability regime. Indeed, as we will see, the general rules of fault-based liability were applied.

In this case, gas escaped from service pipes, property of the defenders, and found its way into the pursuer's house, causing personal injuries to herself and her child, and resulting in the death of her husband. One of the grounds of her claim was the rule in *Rylands v Fletcher*:<sup>25</sup> all that was needed to establish liability, she argued, was that there was a non-natural use of land and that such use created a danger. There was no need to aver fault. The Court unanimously decided that providing gas to houses was not a non-natural use of land and that, for this reason, *Rylands* was not applicable.<sup>26</sup> It adopted for the provision of gas for domestic purposes the qualification that *Rickards v Lothian*<sup>27</sup> had introduced to the application of *Rylands* in the context of provision of water: “[i]t must be some special use bringing with it

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<sup>23</sup> This flexible approach is abandoned in the Rest (3d): see § 20.

<sup>24</sup> *Miller v Robert Addie* (n 8).

<sup>25</sup> *Rylands* (n 3).

<sup>26</sup> *Miller v Robert Addie* (n 8) at 154 per Lord Justice-Clerk Aitchison, 156 per Lord Hunter, 157 per Lord Anderson, and 159 per Lord Murray.

<sup>27</sup> *Rickards* (n 9).

increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community”.<sup>28</sup>

Thus the wording Whitty employs for his formulation “conduct causing a special risk of abnormal danger” seems to combine elements from both the *Rickards* definition of the conduct that triggers the application of the *Rylands* rule – *special use* that brings *increased danger* – and the definition of the conduct that attracts strict liability in the Rest (2d) – *abnormally dangerous* activities. However, the reference to a *special use*, is replaced by Whitty with the reference to a *special risk*, without signalling explicitly the reason for the change, if there was a particular one. The result is a redundant, and perhaps confusing definition, since it is based upon both risk and danger, two concepts that are not easily distinguishable.<sup>29</sup> If risk and danger are the same, then we end up with two separate requirements for this risk or danger: it has to be both special and abnormal. It is not clear whether these are actually two different requirements and we do not find assistance in Whitty’s entry or his references to answer this question.

There are, moreover, two fundamental issues that leave *Miller* in a rather problematic position as authority to support the category under discussion. On the one hand, the authority upon which *Miller* relies provides some insights about the rule’s scope and nature, but certainly does not provide clear and conclusive views (a). On the other hand, the case keeps the category connected with *Rylands* (b).

(a) The central question in *Miller* was whether the escape of gas from the defender’s service pipes triggered the application of the *Rylands* rule, a rule that was identified with those applied in the cases of *Kerr v Earl of Orkney*,<sup>30</sup> *Chalmers v Dixon*,<sup>31</sup> and *Caledonian Railway Co v Greenock Corp*.<sup>32</sup> The issue was, therefore, one about the scope of application of the rule, though some of the judges manifested their views about the nature of the rule.

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<sup>28</sup> Ibid at 280 per Lord Moulton.

<sup>29</sup> The notions of danger and risk are, indeed, expressly considered to be synonyms in the Restatement. Rest (2d) § 282 comment c.

<sup>30</sup> *Kerr v Earl of Orkney* (1857) 20 D 298.

<sup>31</sup> *Chalmers* (n 20).

<sup>32</sup> *Caledonian Railway Co v Greenock Corp* 1917 SC (HL) 56.

In *Kerr v Earl of Orkney*<sup>33</sup> the defender erected a large dam that only a few months after its construction, and as a consequence of a heavy rainfall, burst and swept away the pursuer's houses and structures.

In the decision, the judges made some relevant remarks about the nature of the defender's liability, the language of which seems to point towards strict liability. Lord Justice-Clerk Hope submitted that, when an operation reaches a certain level of danger, the person engaging in such operation must afford "complete protection" to potential victims; he must provide security even against extraordinary events. The defenders "were exposed to no danger before the operation. He creates the danger, and he must secure them against danger". Proof of skill and care was deemed irrelevant: the fact that the dam gave way immediately after its construction showed that it was not constructed so as to provide the security it was bound to afford.

*Damnum fatale* would have exempted the defender from liability, but it was not present in the case.<sup>34</sup> In the same line, Lord Murray considered that this type of operation required "security of all who are liable to be affected by it [and] reparation for all damage occasioned by its inefficiency".<sup>35</sup>

However, the reasoning contained in the Lord Ordinary's decision in *Kerr*, to which the Second Division also adhered, points towards liability based upon fault rather than strict, though given the nature of the operations and the circumstances of the accident, they deserved a "special" treatment. In the Lord Ordinary's opinion, the construction of the dam "was attended with some hazard, and required great care and caution". The neighbours "were entitled to rely on the respondent's availing

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<sup>33</sup> *Kerr* (n 30).

<sup>34</sup> *Ibid* at 302-303.

<sup>35</sup> *Ibid* at 304. Lord Murray's reference to the case of *Macdonald of St Martin's v Spittal's Trs* is obscure: there seems to be no such a case in the reports. E M Clive, "The Thirteenth Report of the Law Reform Committee for Scotland" [1964] JR 250 at 252, after analysing a different report of *Kerr* (30 Sc Jur 158), concludes that Lord Murray was, in fact, referring to two cases: *Spittal's Trs*, which in Clive's view corresponds with *Cleghorn v Taylor* (1856) 18 D 664, and *Macdonald of St Martin's*, which he does not identify. This second reference might be to *M'Donald v Mackie and Co* (1831) 5 W&S 462 – I thank Prof Elspeth Reid for bringing my attention to the case. The cases are of not much assistance: while *Cleghorn* seems to refer to liability of landowners for the wrongs of their contractors, *M'Donald* is concerned mostly with contractual liability.

himself of the best skill, the best materials, and the best workmanship”,<sup>36</sup> language that appears to point to a very high standard of care. The fact that the accident occurred “in reference to a recent work, constructed by a private party for his own pleasure, must be held to throw on the respondent the burden of explaining the fact on some footing consistent with the strength and sufficiency of the work”.<sup>37</sup> It is not clear, however, whether what operates here is a presumption of fault in the strict sense, or the *res ipsa loquitur* doctrine.<sup>38</sup> The wording seems to point to the latter, since it does not burden the defender with the proof of diligence but only with the provision of an explanation that is consistent with it.<sup>39</sup>

With regard to the scope of application of this special regime, Lord Justice-Clerk Hope identified danger as the key element: complete protection is the condition for operations involving “great risk to the safety of life and of property”. Lord Murray, on the other hand, seems to have focused on the “novelty” of the operations, that is, on the introduction of something that was not previously in the land, by linking the duty to provide security and to compensate with the notion of *novum opus*.<sup>40</sup> This notion had been used by the Lord Ordinary, who defined it as “an innovation [...] voluntarily erected for the benefit or pleasure of the respondent”.<sup>41</sup>

Ten years later, *Rylands v Fletcher* was decided by the House of Lords.<sup>42</sup> Over time, the case provided the label for the special liability regime; “the *Rylands* rule”. The facts are widely known and, to an extent, similar to those in *Kerr*: the defendant employed an engineer and a contractor to build a reservoir on his land, who in turn failed to block certain disused shafts and passages that connected the defendant’s land with the plaintiff’s coalmines, located under neighbouring land. As a result, the water introduced into the reservoir flowed through these shafts and passages, flooding the

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<sup>36</sup> *Kerr* (n 30) at 300.

<sup>37</sup> *Ibid*.

<sup>38</sup> For the distinction, see chapter 1 section 3.5.

<sup>39</sup> Reid (n 18) at 749 supports the latter view.

<sup>40</sup> *Kerr* at 303.

<sup>41</sup> *Ibid* at 300. The *novum opus* terminology can also be found in the case of *Potter v Hamilton and Statheven Railway Co* (1864) 3 M 83; and more recently in the Sheriff Court case of *D McIntyre & Son Ltd v Soutar* 1980 SLT (Sh Ct) 115, where this terminology was considered more satisfactory than that of non-natural use.

<sup>42</sup> *Rylands* (n 3).

forementioned mines. The Exchequer Chamber, reversing the Court of Exchequer's decision, held that the defendant was liable for the damage caused, and the latter decision was upheld by the House of Lords.

The dicta contained in this decision point more clearly towards a strict liability rule. In the words of Lord Chancellor Cairns, owners engaging in this type of operation act "at their own peril", becoming liable if damage results "in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so". Quoting Blackburn J's dictum in the Exchequer Chamber decision,<sup>43</sup> the Lord Chancellor highlighted the limited availability of defences: the defendant could escape liability by showing that the accident was the consequence of the plaintiff's own fault, or of *vis major* or an act of God, which were not present in the case.<sup>44</sup> Lord Cranworth, agreeing with the Lord Chancellor, considered that the owner engaging in such operation was "responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage", referring to authority that supported the irrelevance of skill and care.<sup>45</sup>

Now, to what type of operations did this liability rule apply? The Exchequer Chamber's decision focused on the element of danger: "the person who, for his own purposes, brings on his land and collects and keeps there *anything likely to do mischief* if it escapes", mentioning if almost incidentally – in parenthesis – the fact that the thing brought into the land "was not naturally there".<sup>46</sup> In the House of Lords decision, the Lord Chancellor expanded this qualification: the plaintiff cannot complain if the use falls within the "ordinary course of enjoyment of land".<sup>47</sup> For the defendant to be liable, the use had to be

a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land.<sup>48</sup>

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<sup>43</sup> *Fletcher v Rylands* (1865-66) LR 1 Ex 265 at 279.

<sup>44</sup> *Rylands* (n 3) at 339.

<sup>45</sup> *Ibid* at 340-341.

<sup>46</sup> *Fletcher v Rylands* (n 43) at 279 per Blackburn J (emphasis added).

<sup>47</sup> *Rylands* (n 3) at 339-340.

<sup>48</sup> *Ibid* at 340.

The next of the four cases considered by *Miller* was *Chalmers v Dixon*.<sup>49</sup> In this decision, some of the judges in the Inner House explicitly brought liability by virtue of the *Rylands* rule back to a fault framework. The defenders had accumulated a bin of refuse which caught fire and kept burning for a substantial period of time, emitting noxious vapours and smoke that reached the pursuer's land, causing inconvenience and injuring his crops.

Despite considering that, according to *Rylands* and *Kerr*, these operations “are only lawful where injury does not happen to the neighbours”, Lord Justice-Clerk Moncreiff submitted that

A good deal has been said as to the necessity of proving *culpa*. I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.<sup>50</sup>

As a consequence, “it is not necessary to prove specific fault. Fault is implied in the result”.<sup>51</sup> In a similar line, Lord Gifford considered that in this type of operation, the defender is to be liable “even though it be not possible to bring home negligence or fault in the ordinary sense”. The foundation of this liability was, in any case, *culpa*, a notion that he considered flexible: “much lighter fault may make a person liable in some circumstances than in others”.<sup>52</sup> Only Lord Ormidale departed from this line of argument, highlighting that the defenders were only entitled to do what they did “at their own peril and risk, as regarded injurious consequences to their neighbours” and specifically quoting Lord Cranworth's dictum from *Rylands*.<sup>53</sup>

Regarding the type of activity that would trigger the application of the *Rylands* rule, each judge employed a different terminology. Lord Justice-Clerk Moncreiff drew a distinction between ordinary uses of property, “to which a neighbour is bound to submit, although they may cause incidental injury to him”, and an *opus*

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<sup>49</sup> *Chalmers* (n 20).

<sup>50</sup> *Ibid* at 464.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid* at 467.

<sup>53</sup> *Ibid* at 466.

*manufactum*, “the bringing an article upon the land which creates a hazard which did not exist before. [...] The present case is a strong illustration of the distinction. The material which caused damage was entirely foreign to the surface of the land”.<sup>54</sup> Consequently, the two central elements of the notion of *opus manufactum* in Lord Justice-Clerk Moncreiff’s view were danger and novelty. Lord Ormidale, in turn, preserved the terminology from *Rylands*, considering that the defenders’ use of land was unusual and unnatural in the sense in which those expressions were used by the Lord Chancellor in that case.<sup>55</sup> Lord Gifford, however, questioned the appropriateness of the terms natural and non-natural use, opting for the notion of uses that are “exceptional or occasional, or require special erections upon or special preparation of the subject”.<sup>56</sup> He considered that taking into account the presence of an *opus manufactum* was “[a]nother way of looking at the matter”, without offering a particular concept of such notion.<sup>57</sup>

The decision will be revisited later in this chapter, as it is the only one of the four decisions cited by *Miller* that is considered in *Kennedy* as authority for the category of conduct causing a special risk of abnormal damage.

The last decision mentioned in *Miller* is that of the House of Lords in *Caledonian Rly Co v Greenock Corp*.<sup>58</sup> In this case, the defenders converted a piece of land into a park, and for this purpose they altered the channel of a burn by enclosing it into a culvert, and built other works that obstructed its flow. During a period of heavy rain, the culvert proved to be insufficient and a flood was caused, reaching and damaging the pursuers’ property.

Most of the dicta contained in the decision focused on discussing whether there had been a *damnum fatale* that released the defender from liability, a defence that the

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<sup>54</sup> Ibid at 464. The notion of *opus manufactum* can be found in the previous case of *Pirie and Sons v Magistrates of Aberdeen* (1871) 9 M 412, in which it seems to be treated as a synonym of *novum opus*; and in the later cases of *Fleming v Gemmill* 1908 SC 340 and *Stirling v North of Scotland Hydro-Electric Board* 1965 SLT 229.

<sup>55</sup> *Chalmers* (n 20) at 466.

<sup>56</sup> Ibid at 467.

<sup>57</sup> Ibid at 468.

<sup>58</sup> *Caledonian Rly Co v Greenock Corp* (n 32).

defender failed to establish. The discussion about the basis of this liability is not developed in much detail.

Lord Chancellor Finlay, taking into consideration the cases of *Kerr* and *Tennent v Earl of Glasgow*,<sup>59</sup> approved Rankine's view<sup>60</sup> that the person who builds an *opus manufactum* on the course of a stream or diverts its flow is to be liable if (i) the damage would have not occurred in the absence of such construction or operation, and (ii) the *opus* has not been fortified by the operation of prescription.<sup>61</sup> In a similar line, Lord Shaw, based on the case of *Kerr*, explained that the person collecting and damming up the water of a stream must make lower proprietors "as secure against injury as they would have been had nature not been interfered with".<sup>62</sup> Both formulations, consequently, seem to highlight causation of harm as the basis of liability. Lords Dunedin and Parker also identified *Kerr* as the relevant authority, and deemed it approved by the House of Lords in the case of *Tennent*, but did not offer further insights about the basis of liability.<sup>63</sup> Lord Wrenbury, on the contrary, considered that the facts of *Kerr* did not fit the facts under discussion, that is, the flow of the water being thrown to a new channel given that the natural channel was filled up as a consequence of the defender's works. He considered, nevertheless, that the defenders' liability was based on their failure to provide a channel that was equally efficient as the natural one,<sup>64</sup> focusing mainly upon the fact of their interference.

These remarks about the basis of liability also disclose some notions about the scope of the liability rule applied in the case. The Lord Chancellor, by approving Rankine's view, relied on the notion of *opus manufactum*, but his approach does not seem to refer to *opera manufacta* generally, but only to that which is constructed "on the course of a stream". Diversion of the course of the stream appears as a different situation, but subject to the same rule. The reference to prescription emphasises the novelty element. In connection with the facts in *Kerr*, Lord Shaw simply referred to the case of a person "making operation for collecting and damming up the water of a

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<sup>59</sup> *Tennent v Earl of Glasgow* (1864) 2 M (HL) 22.

<sup>60</sup> Rankine, *Land-Ownership* 376.

<sup>61</sup> *Caledonian Rly Co v Greenock Corp* (n 32) at 61.

<sup>62</sup> *Ibid* at 65.

<sup>63</sup> *Ibid* at 63 and 67.

<sup>64</sup> *Ibid* at 67.



stream” – which was not, it must be said, exactly the case in *Caledonian* – whereas Lord Wrenbury referred specifically to the facts of the case. These observations reveal a somewhat restrictive view of the rule’s scope of application, linked more or less tightly with the facts of the case, yet seemingly highlighting interference with nature as a defining element.

The conclusion from this survey is rather evident: the decision in *Miller* and the authority cited in it provide us neither with a single explanation of the nature of the liability rule attached to “conduct causing a special risk of abnormal damage”, nor with a clear delimitation of the scope of this category of conduct.

Although the three Scottish cases cited in *Miller* were all identified as an application of the *Rylands* rule, on closer analysis they seemingly rest upon differing regimes. The reasoning in *Rylands* and *Caledonian* suggests the operation of a strict liability rule, founding liability on the element of causation and limiting the admissible defences to those that break this link. In *Chalmers*, on the other hand, liability is explained in fault terms, though different speeches highlight different elements of this liability: while Lord Moncreiff seemed to have relied upon some sort of presumption of fault, Lord Gifford appears to have stressed a particularly heightened standard of care for this type of activity.

In *Kerr* we find elements pointing in both directions. References to the defender’s obligation to afford complete protection for a danger that he created, and to the irrelevance of diligence as a defence, suggest the recognition of a strict liability rule, placing the emphasis in causation. It is not clear, however, whether such defence was deemed irrelevant because of the nature of the liability rule or because the accident happened so shortly after the construction was finished, showing that it was not properly built, i.e., that adequate precautions were clearly not taken. Moreover, the Lord Ordinary’s judgment supports a fault-based reading of the decision.

The dicta contained in *Miller* are a good reflection of this dichotomy of views. While recognising the existence of a special regime of liability based upon these decisions, Lord Justice-Clerk Aitchison questioned whether the *Rylands* rule was ever

treated in Scotland as one of absolute liability, and after quoting Lord Gifford and Lord Moncreiff's dicta in the case of *Moffat & Co v Park*,<sup>65</sup> he concluded that

in those cases in which the doctrine of *Rylands v Fletcher* has been held to apply the obligation to take adequate precautions has been of so onerous and imperative a kind that the mere occurrence of damage and injury has of itself been sufficient to justify an inference of negligence.<sup>66</sup>

Conversely, Lord Anderson considered that the acceptance of the *Rylands* rule as one of absolute obligation in Scotland was “fully documented” by the mentioned authorities, i.e. *Kerr*, *Chalmers*, and *Caledonian*.<sup>67</sup>

The dichotomy was, again, reflected in two decisions pronounced in the following decade: the Outer House decision in *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council*,<sup>68</sup> a case of harm to property caused by detonation of explosives; and the Inner House decision in *M'Laughlan v Craig*,<sup>69</sup> a case of personal injury and harm to property caused by an escape of gas and subsequent explosion. In the first case, Lord Patrick considered that the detonation of a considerable quantity of high explosives was an activity that the defender did at his peril, becoming liable for the damage caused “apart from any question of his negligence”, in application of the *Rylands* rule.<sup>70</sup> In the second case, however, Lord President Cooper questioned, once again, the acceptance of the *Rylands* rule in Scotland, especially in light of the constraints imposed to the rule in England by the House of Lords in the case of *Read v J Lyons & Co Ltd*,<sup>71</sup> decided two years earlier. He concluded that

[t]here are of course cases in which there is little difference in the result between the application of the English rule of absolute liability and the Scottish rule of *culpa*, where the facts raise a presumption of negligence so compelling as to be practically incapable of being displaced. But, when it comes to extending the rule in *Rylands v Fletcher* to situations undreamt of by those who formulated it, we cannot ignore the wide distinction in principle between the two systems without destroying the very basis of the Scots law of delict.<sup>72</sup>

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<sup>65</sup> *Moffat & Co v Park* (1877) 5 R 13.

<sup>66</sup> *Miller v Robert Addie* (n 8) at 155.

<sup>67</sup> *Ibid* at 157.

<sup>68</sup> *Western Silver Fox Ranch Ltd v Ross and Cromarty County Council* 1940 SC 601.

<sup>69</sup> *M'Laughlan v Craig* 1948 SC 599.

<sup>70</sup> *Western Silver Fox Ranch* (n 68) at 603.

<sup>71</sup> *Read v J Lyons & Co Ltd* [1947] AC 156.

<sup>72</sup> *M'Laughlan v Craig* (n 69) at 611.

Lord Aitchison and Lord Cooper's views crystallised by the 1960s as the orthodox view of this liability regime in the legal literature: it consists of nothing more than a very high standard of care, commensurate with the level of danger created by the activity, combined with a presumption of its breach. Liability is, accordingly, fault-based. This view, which can indeed be traced back in the literature to Glegg,<sup>73</sup> was notably held by Walker and TB Smith before it became the view of the Law Reform Committee for Scotland.<sup>74</sup>

While recognising that in *Kerr* there were dicta that might suggest the existence of a strict liability rule, Walker explained it as a “decision on negligence where a higher standard of care than usual was demanded and fault was presumed from what happened rather than proved”.<sup>75</sup> After analysing successively the cases mentioned in this section, he concluded that “the whole body of Scottish decisions are only consistent with each other on the basis that in appropriate cases fault is presumed from the happening”.<sup>76</sup> This combination of a very high standard of care with an inference or presumption of fault was his explanation of liability imposed in cases of escapes of artificial accumulation of water, explosives and noxious fumes.<sup>77</sup> What remains unclear is the nature of this presumption or inference of fault, for he clarifies that it is based on the fact that these substances escaped and caused damage, adding that “[i]n any event the conditions for the application of *res ipsa loquitur* seem to be satisfied”,<sup>78</sup> implying that *res ipsa loquitur* is a separate device and not the source of the presumption. He would later label this regime as one of “strict liability”, but still

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<sup>73</sup> Glegg, *Reparation* 18-19 and 275-276, based upon the cases of *Laurent v Lord Advocate* (1869) 7 M 607 and *Pirie and Sons v Magistrates of Aberdeen* (n 54). Glegg's editor maintained this view even after *Caledonian*: whereas he acknowledged that certain dicta in this case might point to strict liability, he argued that the decision could be explained on the basis of fault. He does not, however, offer such explanation. A T Glegg, *The Law of Reparation in Scotland* (J L Duncan ed, 3rd edn, 1939) 20.

<sup>74</sup> Similar views can be found in W Mitchell, “Nuisance and Non-Natural Use of Property” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 10 (1930) at §§ 694-700, without, however, explaining the origin of the imputation or implication of negligence; and in J J Gow, “Is Culpa Amoral?” (1953) 65 JR 17 at 25-26, though his explanation relies only on the high standard of care.

<sup>75</sup> D M Walker, “Strict Liability in Scotland” (1954) 66 JR 231 at 239.

<sup>76</sup> *Ibid* at 250.

<sup>77</sup> *Ibid* at 251.

<sup>78</sup> *Ibid*.

explain it as depending on circumstances requiring special care coupled with “a willingness to presume fault” by courts.<sup>79</sup>

TB Smith held a similar position, concluding that *Rylands*, as a rule of absolute liability, had never served as the sole basis of liability in Scotland in the absence of negligence – often presumed, acknowledging nonetheless that the difference in practice might be negligible. He clearly identified the abovementioned presumption of negligence as a result of the operation of the principle of *res ipsa loquitur*.<sup>80</sup>

These views were later reflected in the conclusions reached by the Law Reform Committee for Scotland in their *Thirteenth Report* on damage caused by dangerous agencies escaping from land,<sup>81</sup> discussed in the following section.

As to the scope of “conduct causing a special risk of abnormal danger” itself, the terminology used in the cases referred to by *Miller* is not unequivocal, featuring three different – yet seemingly overlapping – elements which, by themselves or in combination, serve to define the type of activity that will attract the application of a special liability rule: the creation of a danger, the introduction of something new or artificial onto the land, and the departure from what is considered a normal or natural use of the land. We only obtain, through the reference to *Rickards*, a clear exclusion: the provision of basic services for domestic purposes, such as water and gas. This exclusion had actually been recognised in Scots law before *Rickards*,<sup>82</sup> and it was confirmed in subsequent case law.<sup>83</sup>

(b) There is, moreover, a further problem with the reference to *Miller* as the key authority for defining the conduct and regime under discussion: even though the case questioned the status of *Rylands* in Scotland,<sup>84</sup> it still relied on *Rylands* in recognising

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<sup>79</sup> Walker, *Delict* 645.

<sup>80</sup> Smith, *Short Commentary* 646.

<sup>81</sup> Law Reform Committee for Scotland, *Thirteenth Report: The Law relating to Civil Liability for Loss, Injury and Damage caused by Dangerous Agencies Escaping from Land* (1964).

<sup>82</sup> *Clarke v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 12 (water).

<sup>83</sup> *Spiers v Newton-on-Ayr Gas Co* (1940) 56 Sh Ct Rep 226 (gas); *M’Laughlan v Craig* (n 69) (gas); and *R Wylie Hill & Co Ltd v Glasgow Corporation* 1951 SLT (Notes) 3 (water). In the case of *Western Silver Fox Ranch* (n 68) the exclusion was held not applicable precisely because the operations (detonations of explosives for building purposes) were not considered beneficial for the general community, like the provision of water and gas.

<sup>84</sup> See p 112 above.

the existence of a category deserving special treatment. At the time Whitty was writing, however, the House of Lords had already decided in *RHM Bakeries* that *Rylands* was not part of Scots law,<sup>85</sup> so in this aspect, the case could be considered as superseded by *RHM Bakeries*.

Certainly *Miller* was not an application of the *Rylands* rule, so in this sense the result is not inconsistent with *RHM Bakeries*. But *Miller* still recognised the existence of a special regime of liability and defined the conduct to which the regime was to be applied by reference to the case of *Rickards*. *Rickards*, in turn, meant to introduce a qualification precisely to the *Rylands* rule. Consequently, the very reason why the court did not apply the *Rylands* rule in *Miller* was that the facts of the case were outside of its scope by virtue of the *Rickards* qualification, and not because the *Rylands* rule was not part of Scots law.

The subsequent exclusion of *Rylands* by *RHM Bakeries* leaves *Miller* as a rather weak support for the definition of the types of conducts or activities that create a special risk of abnormal damage, unless we adopt a view of *RHM Bakeries* that on the one hand denies the strict nature of the liability rule but nevertheless still recognises a special regime of liability generally applicable for dangerous activities. But *RHM Bakeries* provides us with little evidence of such approach, apart from the possibility of releasing the pursuer from proving the precise nature of the defender's fault in certain circumstances that, again, are not clearly delineated.<sup>86</sup> This possibility is considered in the next section. On the contrary, *RHM Bakeries* seems to recognise no special regime at all, apart from the rule applicable to the specific factual setting present in the *Caledonian Rly Co* case.

### 2.1.3. Further references to dangerous activities in Whitty's entry: the *Thirteenth Report* and the "separation of waters"

Beyond paragraph 2087, which is the direct source mentioned in *Kennedy* for the category, Whitty deals with dangerous activities in two further occasions: (a) when he

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<sup>85</sup> *RHM Bakeries* (n 4) at 41 per Lord Fraser of Tullybelton.

<sup>86</sup> *Ibid* at 45 per Lord Fraser of Tullybelton.

explains the reasons for the (mistaken, in his view) belief that liability in nuisance is generally strict, and (b) when he discusses the burden of proof of fault. These references, however, tend to confirm what was submitted about *Miller* and its sources: they do not contribute particularly to the clarification of the category under analysis and they stay strongly connected with *Rylands*.

(a) The first point is developed in paragraph 2093, according to which one of the reasons for the idea that nuisance was generally subject to a strict liability rule was the identification of nuisance with “doctrines on abnormally dangerous things or activities”.<sup>87</sup> In his view, some cases confused nuisance with the rule in *Rylands*, “or its Scots analogue, the rule in *Kerr v Earl of Orkney*”.<sup>88</sup>

He cites as an example of this confusion the case of *Slater v M’Lellan*,<sup>89</sup> where a compressed cork cargo caught fire when it was reached by sparks falling from the locomotive that was drawing it, and burning particles from the cargo caused damage to the defender’s property. Damages were awarded in nuisance, without proof of fault. According to Whitty, the categories of “dangerous nuisances” and “class of distinctively dangerous things” outlined in the case are indistinguishable from the *Rylands* category, questioning the authority of *Slater* beyond its specific type of factual setting (i.e. traction engines and locomotives on the highway) after the fall of *Rylands*.<sup>90</sup>

The second example is the case of *Giblin v Lanarkshire County Council Middle Ward District Committee*,<sup>91</sup> where the escape of gas from pipes caused the fatal poisoning of the pursuer’s mother. The nuisance issue was allowed, without averments of fault – in fact, as an alternative to the fault issue – under the rule that “one who brings a dangerous agent on his land or keeps there anything likely to do damage if it escapes, must keep it at his peril”, a language that strongly resembles *Rylands* even though the case was not mentioned.<sup>92</sup> *Giblin*, however, was considered in *RHM Bakeries* as

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<sup>87</sup> Whitty, “Nuisance” §§ 2092 and 2093.

<sup>88</sup> Ibid § 2093.

<sup>89</sup> *Slater v M’Lellan* 1924 SC 854.

<sup>90</sup> Whitty, “Nuisance” § 2093.

<sup>91</sup> *Giblin v Lanarkshire County Council Middle Ward District Committee* 1927 SLT 563.

<sup>92</sup> Ibid at 565.

impliedly overruled by the cases of *Miller* and *M'Laughlan v Craig*.<sup>93</sup> These cases, as discussed above, were cases of gas escapes that recognised the *Rickards* exclusion for the *Rylands* rule.<sup>94</sup> So again, the reason why these cases overrule *Giblin* is that the facts of the case would not fall within the scope of application of the *Rylands* rule – and not that the rule is not part of Scots law.

Whitty finishes the paragraph by highlighting the decline of *Rylands* since the decision in *RHM Bakeries*, save the only possible exception of the interference with the course of a natural stream according to the *Caledonian Rly Co*<sup>95</sup> case.<sup>96</sup> It is not clear, then, what scope and effects he ascribes to these doctrines on abnormally dangerous things or activities, but his view seems to be that there is now little or no space for them in Scots law insofar as they were applications of *Rylands*. His rejection, however, appears limited to these doctrines inasmuch they suggest a regime of strict liability generally applicable to nuisance, but the position of the doctrines in their limited scope (traction engines and interference with water courses) is not developed further, nor linked to his own category of conduct creating a special risk of abnormal danger.

(b) The second point – onus of proof of fault – is discussed by Whitty in paragraph 2107, where he connects his main source for conduct causing special risk of abnormal danger, namely the case of *Miller*, with the *Thirteenth Report* of the Law Reform Committee for Scotland, which deals with liability for damage caused by dangerous agencies escaping from land.<sup>97</sup>

In this section he presents certain types of cases where allegedly the burden of proof of fault would be reversed, one of which is the treatment of “the Scots equivalent” of the *Rylands* rule – without indicating a specific case – according to the explanation given by the Report. He reproduces one of the concluding paragraphs of the Report that attaches an especially high standard of care to the introduction of dangerous agencies into land in certain cases,<sup>98</sup> and then he explains that “[i]n this

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<sup>93</sup> *RHM Bakeries* (n 4) at 42 per Lord Fraser of Tullybelton.

<sup>94</sup> See pp 104 and 113 above.

<sup>95</sup> *Caledonian Rly Co v Greenock Corp* (n 32).

<sup>96</sup> Whitty, “Nuisance” § 2093.

<sup>97</sup> Law Reform Committee for Scotland (81).

<sup>98</sup> *Ibid* § 17.

class of case there must presumably be a ‘special use’ creating ‘abnormal danger’”, by reference to *Miller*.<sup>99</sup> It must be noted that here the substitution of special *risk* for special *use* does not take place, which reinforces the impression that the change in the formulation of “conduct causing special risk of abnormal danger” might not have had a particular reason.<sup>100</sup>

The Report examined the relevant case law for three sets of common law rules that were regarded as relevant for the problem of escapes of dangerous agencies: the law governing the rights of riparian proprietors among themselves, the law of nuisance, and the rules that do not fall within any of these two sets. The Committee believed that the law in the first and second sets was clear, but less so in the third set of rules.<sup>101</sup> For this a special regime of liability was appropriate based upon the concept of non-natural use, whereby “proof of specific fault on the part of the defender is unnecessary”.<sup>102</sup>

The Commissioners seemed to have no problem with the understanding of *Caledonian*, and even of *Kerr*, as applications of a strict liability rule falling within the first set of rules, insofar as they were both alterations of the natural course of a stream and, in that sense, infringements of the property rights that the law confers to riparian owners.<sup>103</sup> The extension of this rule to other “escapes” was, however, considered inconsistent with more recent authority: the cases of *Miller* and *M’Laughlan*. Adopting, consequently, the views of Lords Aitchison and Cooper in those cases,<sup>104</sup> they concluded that

if a person brings a dangerous agency on to land, the standard of care demanded of him by the law – at any rate where “non-natural” use of the land is involved – is so high that his liability, should the agency escape and cause damage, is in practice absolute or near absolute. A person claiming in respect of damage suffered in such circumstances need not prove the defender guilty of specific fault, for the facts raise a presumption of negligence...<sup>105</sup>

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<sup>99</sup> Whitty, “Nuisance” § 2107.

<sup>100</sup> See p 105 above.

<sup>101</sup> Law Reform Committee for Scotland (n 81) § 14.

<sup>102</sup> Ibid § 15.

<sup>103</sup> Ibid §§ 6-7, a classification challenged by Clive (n 35) at 252, for the cases were decided by reference to authority that either had nothing to do or was not based upon principles “peculiar to riparian owners”.

<sup>104</sup> See p 112 above.

<sup>105</sup> Law Reform Committee for Scotland (n 81) § 17.



Explaining *Kerr* in these terms was considered as preferable and consistent with the dicta in *Chalmers*.

As to the nature of the liability rule, though the view adopted is clearly fault-based, it was submitted that it made “little, if any, difference in the result whether one adopts what may be called the ‘absolute liability’ theory or adheres rigidly to the fault principle”, and recommended no changes to the existing law.<sup>106</sup> Once again, the origin of the negligence presumption is not clear. TB Smith, however, was of a different opinion as to the need for changes: even though he supported the fault-based view of the solution, he believed that, for the sake of clarity, *Rylands* should explicitly be excluded from Scots law, on the basis that strict liability rules should be adopted exclusively through statutory provisions.<sup>107</sup>

The Committee recognised, nevertheless, it was not entirely clear to which conduct this regime should apply, in light of the restriction imposed on *Rylands* south of the border: at the time of the Report, the *Rylands* rule had been strictly limited to escapes “from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control”.<sup>108</sup> The Commissioners considered that the configuration of this type of case as escapes of dangerous agencies in the course of non-natural uses of land was unsatisfactory for two reasons: first, because of the difficulties in recognising a non-natural use; second, because it was limited to *escapes* only.<sup>109</sup> TB Smith shared these concerns: he considered illogical limiting any special regime only to escapes, and regarded the notion of natural use “a nebulous concept”, among other remarks. He deemed the American approach as a better solution in that it was, at least, logical: the special regime of liability was generally applicable to the category of ultra hazardous activities.<sup>110</sup> This reinforced his proposal to eliminate the *Rylands* rule altogether, bringing the treatment of dangerous agencies simply under the general liability rules.

In sum, while TB Smith defended the treatment of dangerous activities under the regular rules of fault-based liability, unless a rational strict liability regime were to

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<sup>106</sup> Ibid § 22.

<sup>107</sup> Ibid Note of dissent.

<sup>108</sup> *Read v J Lyons & Co Ltd* (n 71) at 168 per Viscount Simon.

<sup>109</sup> Law Reform Committee for Scotland (n 81) § 21.

<sup>110</sup> Ibid Note of dissent.

be created by statute, the rest of the Committee favoured the special treatment of these activities, so that although liability remained fault-based, the regular rules in regard to proof of fault did not apply in the face of non-natural uses causing escapes of dangerous things.

Eventually, TB Smith's view triumphed, at least in principle: according to Lord Fraser's well-known dictum in *RHM Bakeries*, nuisance was and always had been fault based. Moreover, the decision in *Rylands* "has no place in Scots law, and the suggestion that it has is a heresy which ought to be extirpated".<sup>111</sup> He submitted that liability in *Kerr* was based upon fault, relying on the Lord Ordinary's decision, a conclusion that was reinforced by the language in *Chalmers*.<sup>112</sup> The sole possible exception to this rule was the alteration of the natural course of a stream according to the decision in *Caledonian*, a decision he considered to be limited to this type of operation only.<sup>113</sup> Yet he added two comments that deserve to be noted:

The first is that the view that I have just expressed does not by any means imply that, in a case such as this, a pursuer cannot succeed unless he avers the precise nature of the fault committed by the defender which caused the accident. It would be quite unreasonable to place such a burden on a pursuer, who in many cases will have no knowledge, and no means of obtaining knowledge, of the defender's fault. As a general rule it would, in my opinion, be relevant for a pursuer to make averments to the effect that his property has been damaged by a flood caused by an event on the defender's land, such as the collapse of sewer which it was the defender's duty to maintain, that properly maintained sewers do not collapse, and that the collapse is evidence that the defender had failed in his duty to maintain the sewer. The onus will then be on the defender to explain the event in some way consistent with absence of fault on his part. As a general rule the defences available will be limited to proving that the event was caused either by the action of a third party for whom he was not responsible, as the defender did in *Gourock Ropework Co Ltd v Greenock Corporation*, or by a *damnum fatale*.

My second comment is that I do not believe that there is much difference in the practical result between the law as laid down in *Rylands v Fletcher*, and the law as laid down according to my understanding of *Kerr v The Earl of Orkney*. On that matter, I accept the majority view expressed in the Thirteenth Report of the Law Reform Committee for Scotland (1964), para. 22...<sup>114</sup>

These comments are somewhat puzzling. On a first reading, the first comment seems to highlight, though in a rather imprecise language, the availability of the *res ipsa*

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<sup>111</sup> *RHM Bakeries* (n 4) at 41, references omitted.

<sup>112</sup> *Ibid* at 39-40.

<sup>113</sup> *Ibid* at 42.

<sup>114</sup> *Ibid* at 45.

*loquitur* doctrine generally for nuisance cases, an interpretation that has been supported by subsequent cases,<sup>115</sup> whereas the second comment, given the cases there mentioned, appears to refer to the special regime for dangerous activities under discussion here, reproducing the fault-based account adopted in the *Thirteenth Report*. But the limited defences offered in the first comment do not fit with its understanding as a description of *res ipsa loquitur*. They could find a more suitable place within the regime mentioned in the second comment, and even there, they would point towards a strict liability regime rather than one based upon presumed fault. Moreover, and more importantly, the second comment seems to undo, to an extent, what *RHM Bakeries* seeks to do: instead of eliminating any special liability regime and giving space for the fault rules to operate with their inherent flexibility, it preserves the special regime in line with the majority position of the Committee.

In his discussion of these comments, Whitty considered that in both cases a reversal of the onus of proof of fault operates, but distinguished the two cases on the basis of the source of this reversal: whereas in *res ipsa loquitur* the alleged reversal comes from the fact that the incident suggests negligence coupled with the defender's control, in the case of dangerous activities the reversal derives from a very high standard of care, citing the conclusion reached by the Law Reform Committee.<sup>116</sup>

The sources cited by Whitty in these paragraphs bring about a distinction that *Miller* and its sources did not outline clearly. *Miller* grouped together *Kerr*, *Chalmers* and *Caledonian* and saw them all as applications of a single rule (the *Rylands* rule), subject to a single qualification (the *Rickards* qualification). But the sources considered in this section separate *Caledonian* from the group.

*Caledonian* is seen as the application of a liability rule that is strict in nature and that is applicable to a particular type of case: the alteration of or interference with the natural course of a stream, for this particular course of action infringes proprietary

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<sup>115</sup> See *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381 esp at 383, and more recently in *David T Morrison & Co Ltd v ICL Plastics Ltd* 2013 SC 391; [2013] CSIH 19 at § 35, though this case was reversed in the Supreme Court on the point of prescription: *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222; [2014] UKSC 48. See, for a very recent application, *McKenna v O'Hare* [2017] SAC (Civ) 16, though the notion of *res ipsa loquitur* is not expressly referred to and the language of the decision is, at times, conceptually misleading.

<sup>116</sup> Whitty, "Nuisance" § 2107.

rights held by the riparian proprietors. This remained the accepted explanation of *Caledonian* until a more recent study<sup>117</sup> sought to demonstrate that the true basis of liability in the case was fault. These views are discussed at length and challenged in chapter 4,<sup>118</sup> so for the purposes of this chapter, the case is excluded from the analysis.

For the rest of the cases, as explained above, the orthodox account is a fault-based explanation that combines two particular aspects of negligence: a substantive one, namely the standard of care's sensitivity to levels of risk, and an evidentiary one, i.e. a presumption, the source of which is found in the operation of the *res ipsa loquitur* maxim (as advanced by TB Smith), or in the operation of the standard of care itself (in Whitty's explanation), or is left largely unexplained – as in Walker, the *Thirteenth Report* and, to an extent, *RHM Bakeries*).

But despite the relatively clear answer to the question about the nature of the liability rule, the problems identified in connection with *Miller* are replicated with regard to the question about its scope: not only does the notion of escapes in the context of non-natural use remain unclear but actually connected to the *Rylands* rule.

TB Smith's position solved the two problems, for it advanced a clear rule that broke once and for all the link with *Rylands*, and this is, as explained, the position adopted in principle by *RHM Bakeries*. Nevertheless, by incorporating the category of conduct causing special risk of abnormal danger, Whitty seems to have considered that there was still a case for a special treatment of dangerous activities, and the cost of this option was preserving the problematic sources, in the same way Lord Fraser's second comment in *RHM Bakeries* did. To the extent that *Kennedy* relied on Whitty's view, the category not only remains rather unclear and connected to *Rylands*, but actually, as the next section will show, undermines the relative clarity of the orthodox account.

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<sup>117</sup> G D L Cameron, "Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*" (2000) 5 SLPQ 356.

<sup>118</sup> See chapter 4 section 3.

## 2.2. The sources of the category (2): *Kennedy* and the authority cited by Lord President Hope

In *Kennedy*, Lord President Hope listed conduct causing a special risk of abnormal damage as the last category of *culpa* and cited four decisions as authority for it.<sup>119</sup> Lord Hope's dictum and the authority there considered, however, do not take us much further than the sources analysed so far. First, even though the nature of this regime remains fault-based, *Kennedy* undermined what at that point was the orthodox explanation of the regime without providing a satisfactory new account. Secondly, although *Kennedy* clearly isolates the relevant element that determines the scope of the category (danger), it provides little assistance in delineating its boundaries.

### 2.2.1. Lord President Hope's dictum

Lord President Hope's dictum in *Kennedy* is clear in at least one aspect: the fault-based nature of liability for conduct causing a special risk of abnormal damage. But clarity ends there: by adopting Whitty's approach from para 2087 of his "Nuisance" entry, i.e. listing conduct creating a special risk of abnormal damage alongside the different categories of fault, but then submitting that it affords an implication of fault, two incompatible views are juxtaposed in the same dictum.

The language used by Lord President Hope suggests that he was perhaps sceptical about this conduct being a different category of fault: when he refers to para 2087 of Whitty's entry and lists the different categories of fault, he mentions only malice, intent, recklessness and negligence. "To that list", he continues, "there may be added conduct causing a special risk of abnormal damage where it may be said that it is not necessary to prove a specific fault as fault is necessarily implied in the result", and refers to *Chalmers* as the source of this contention. Thus, Lord Hope separated this type of conduct from the list and attached to it a particular effect that is more in line with the presumption idea from the orthodox view than with it being a separate category of fault.

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<sup>119</sup> *Kennedy* (n 1) at 99.

The idea that this type of conduct is not a different category of fault is confirmed later on by Lord Hope's suggestion that it was "perhaps just another example of recklessness".<sup>120</sup> Now, whether this suggestion is accurate depends on the notion of recklessness adopted, on the one hand, and on the definition of conduct causing a special risk of abnormal damage, on the other. The issue is discussed later in this chapter, after outlining the relevant elements of the latter,<sup>121</sup> but the conclusion can be advanced here: given the notion of recklessness adopted after *Kennedy*, considering conduct causing a special risk of abnormal damage as an example of recklessness is practically equivalent to treating it as a form of strict liability. But even if the pre-*Kennedy* notion of recklessness is adopted, the suggestion holds only as a *presumption* rather than an *example* of recklessness.

As a result, by incorporating the notion of conduct creating a special risk of abnormal damage in the way it did, *Kennedy* introduced more questions than answers, causing instability to what seemed to be, if not an entirely satisfactory, at least a rather stable explanation of the special treatment received by these cases.

In addition, like *RHM Bakeries*, *Kennedy* set apart the case of *Caledonian* as a possible exception to the general fault-based liability rule, without expressing why this case would attract strict liability.<sup>122</sup> *Caledonian*, therefore, is not identified with conduct causing a special risk of abnormal damage, but as a specific case of strict liability.

With regard to the delineation of the category itself, *Kennedy* isolates risk as the defining element, omitting any reference to the notions of *opus manufactum* and non-natural user, which had been a constant presence in most previous doctrinal and judicial discussions.

Here, Lord Hope departed from Whitty's wording: whereas Whitty named this alleged type of fault "conduct causing a special risk of abnormal *danger*"; the Lord President replaced the word "danger" with the term "damage". Again, we cannot be sure whether the replacement was deliberate and, if it was, what was the reason

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<sup>120</sup> Ibid at 100.

<sup>121</sup> See section 3.2.4 below.

<sup>122</sup> *Kennedy* (n 1) at 98 per Lord President Hope, and at 102 per Lord Kirkwood.

behind it. Nevertheless, the change is welcomed for it removes from the definition the redundancy noted above of including both “risk” and “danger” in the notion<sup>123</sup> and incorporates a second element to the definition. Conduct can amount to fault not only because risk is high, but specifically because the possible damage is great. This incorporation, however, raises a new question: is the category *necessarily* defined by the magnitude of the likely harm or can likelihood and extent of the harm interact, so if the possible harm is particularly highly likely but not great in extent, it will still amount to special risk of abnormal damage? As we will see, the authority on which *Kennedy* relied does not provide an answer to this question.

### 2.2.2. The authority cited in support

The Lord President quoted dicta from four decisions in support of the category under analysis: *Chalmers v Dixon*,<sup>124</sup> *Edinburgh Railway Access and Property Co v John Ritchie & Co*,<sup>125</sup> *Hester v MacDonald*,<sup>126</sup> and *Noble’s Trustees v Economic Forestry (Scotland) Ltd*.<sup>127</sup> We will see that the cases of *Edinburgh Railway Access* and *Hester* are questionable authority, and the assistance provided by the remaining two cases must be considered in light of the specific legal question that was being answered.

The facts of *Chalmers* have been narrated above.<sup>128</sup> Lord President Hope quoted in *Kennedy* the well-known dictum by Lord Justice-Clerk Moncreiff, cited earlier in this chapter, commenting on the cases of *Rylands* and *Kerr*, and presenting fault as the basis of the liability of the proprietor who places dangerous materials in his land and causes damage as a consequence.<sup>129</sup>

The dictum quoted from *Edinburgh Rly Access*, though similar to that in *Chalmers*, must be considered carefully. In this case, the defenders’ blasting operations executed for excavation and subsequent building purposes caused structural damage to the pursuers’ house. The passage reproduced in *Kennedy* comes from the Lord Ordinary’s

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<sup>123</sup> See p 105 above.

<sup>124</sup> *Chalmers* (n 20).

<sup>125</sup> *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299.

<sup>126</sup> *Hester v MacDonald* 1961 SC 370.

<sup>127</sup> *Nobles Trustee’s v Economic Forestry (Scotland) Ltd* 1988 SLT 662.

<sup>128</sup> See p 109 above.

<sup>129</sup> See n 50 above.

judgment (Lord Low) who submitted that, even though the general rule was that fault was required for liability, in the case at issue the question of fault did not arise or was not of importance, rephrasing Lord Moncreiff's dictum from *Chalmers* specifically for the case of blasting operations, and allowing the issue which was not based on fault.<sup>130</sup> The judgment, however, was reversed by the Inner House, where the issue was amended by the introduction of fault,<sup>131</sup> so the relevance attributed to the Lord Ordinary's remarks is somewhat odd.

*Hester*, in turn, was a case of damages for wrongful imprisonment where the action was held incompetent given the absolute privilege of the defenders, and irrelevant for lack of sufficient averments of malice. The dictum cited by Lord President Hope in *Kennedy* is Lord Guthrie's, who affirmed the fault principle and stated that "[t]he culpa which gives a right of action to the sufferer from the act is either intentional injury or negligence. [...] There are, however, cases where the intention is presumed, where the act itself infers the malice".<sup>132</sup> The facts of the case, however, were considered insufficient to bear such an inference. It is not clear how the dictum supports the category under analysis: it merely lists intention and negligence as forms of fault and indicates the possibility of presuming intention, but the facts of the case provide no indication of this presumption having any identifiable link with the notion of danger. The reference to the case is, in sum, altogether strange, since it has no connection with nuisance (the context of *Kennedy*) or with dangerous activities (the category that the Lord President was trying to outline), and malice has a particular meaning in the context of claims against the police that is not readily transferable to neighbour disputes.<sup>133</sup>

Finally, in the Outer House case of *Noble's Trs* the first defenders, in carrying out forestry and related operations authorised by the second and third defenders, riparian proprietors, created a dirt road in a manner whereby sand, silt and gravel were washed off the hillside into a river, causing damage to the pursuers'

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<sup>130</sup> *Edinburgh Rly Access & Property* (n 125) at 302.

<sup>131</sup> *Ibid* at 303.

<sup>132</sup> *Hester v MacDonald* (n 126) at 390.

<sup>133</sup> See E Reid, "The Sheriff in the Heather: *Beaton v Ivory*" in J Grant and E Sutherland (eds), *Pronounced for Doom: Early Scots Law Tales* (2013) at 172-174.



hydroelectric scheme located downstream. Lord Jauncey, referring expressly to Lord Justice-Clerk Moncreiff's dictum in *Chalmers*, stated that

A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour's land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations, either at his own hand or at the hand of the contractor, if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he, the landlord, does not take or instruct those steps. In the former case the landowner's culpa lies in the actual carrying out of his operations in the knowledge actual or implied of their likely consequences. In the latter case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.<sup>134</sup>

The main discussion of the case referred to the liability of the second and third defenders, which explains the specific references to the contractor in the reproduced dictum. The focus of the case was the defenders' non-delegable duty of care, as will be explained below.<sup>135</sup>

From the four decisions mentioned, therefore, only two of them provide some assistance: *Chalmers* and *Noble's Trs*.

With regard to the nature of the liability that conduct causing a special risk of abnormal damage attracts, these cases certainly provide authority for the conclusion reached in *Kennedy*: both cases consider this liability to be fault-based.

It is worth noting in this respect that the dictum quoted from *Chalmers* in *Kennedy*, which is also referred to by *Noble's Trs*, is that of Lord Justice-Clerk Moncreiff, which highlights the implication of fault. Lord Gifford's speech, which emphasises the heightened standard of care, is not considered in *Kennedy*.

As for the scope of the category, both decisions are consistent in drawing a fundamental distinction between two types of cases: in the first type, merely executing certain operations constitutes fault; in the second type, not adopting certain precautions constitutes fault. The configuration of these types of cases is, however, problematical.

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<sup>134</sup> *Noble's Trs* (n 127) at 664.

<sup>135</sup> See p 131.

In *Chalmers*, the first type of case occurs when no precaution can prevent injury, whereas the second one occurs when due care can prevent injury. This opposition, as noted by Clive, is a false alternative, because it does not contemplate a third option: where *some* precaution would prevent injury, but *due* care would not. The “true alternative”, he argues, is that “either due care will prevent injury... or *due care* will not”.<sup>136</sup>

In *Noble’s Trs*, in turn, the distinction is between operations that will or are likely to cause damage however much care is exercised and operations where it is necessary to take steps to prevent damage, which implies that damage can in fact be prevented with those steps. This decision seems to shift the dividing line from *due* care to *any* care, and to get closer to a true alternative.

Both cases, consequently, create a distinction between two types of danger, defined by the fact harm remains likely even where certain precautions are taken. But it is difficult to determine, based on the available authority, what these precautions are, i.e. whether the line is drawn where *any* precautions or only *due* precautions would control risk.

It is also difficult to ascertain whether both types can be incorporated in the notion of conduct creating a special risk of abnormal damage. If “fault is implied in the result” – as Lord President Hope stated in *Kennedy* – in both types, namely in the first type merely for engaging in the dangerous operations, and in the second type for not taking the relevant precautions, what is then the purpose of making the distinction? The decision in *Kennedy* does not provide any indication that serves to discriminate between the two types of danger, for the case was one of intentional or, perhaps, reckless harm.<sup>137</sup>

The dicta from the supporting cases, however, suggest that only the first type of danger can be characterised as conduct creating a special risk of abnormal damage. In both decisions, fault in the second type of danger arises *from not taking precautions*: in *Chalmers*, the defender “is liable if injury occurs for not taking that due care”; in *Noble’s Trs*, “*culpa* lies in not taking steps to avoid consequences”. But in neither of

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<sup>136</sup> Clive (n 35) at 257-256, emphasis in the original.

<sup>137</sup> See p 53 above.

them is it stated that the fact that precautions were not taken is to be inferred from the occurrence of the harm. This contrasts with what happens in the first type, where fault lies simply in engaging in the dangerous operation and is implied by the fact that injury was caused. The contention that fault would be inferred simply from the occurrence of the harm in the second type was only made in one of the cases cited by the Lord President in *Kennedy*: in *Edinburgh Rly Access*, the Lord Ordinary explicitly stated that “if injury to the pursuers’ buildings was not a necessary or natural result of the blasting, but injury in fact resulted, *the inference is that the operation was negligently or unskilfully conducted*”.<sup>138</sup> Nonetheless, as mentioned above, the judgment was reversed and the issue was amended to include fault, which suggests that the Lords in the Inner House might not have regarded the possibility of this inference with approval.

The context in *Chalmers* supports this conclusion: the point was precisely to locate fault *somewhere* when damage is caused even despite taking due precautions, i.e. even when the defenders were not negligent. The defenders, indeed, pleaded that the bing had caught fire for reasons that were not attributable to their lack of care and, further, that it was impossible for them to extinguish the fire once it started. If “traditional” fault (negligence) had had to be proved, it would not have been possible to hold the defenders liable. For Lord Justice-Clerk Moncreiff, however, the relevant question was not about the precautions taken or not taken. “[T]he question”, in his view, was “whether the defenders were entitled to put upon their lands a heap of refuse of this quality”, and he sought to locate fault in this action by saying that if the defenders could not have prevented the consequences that ensued, there was fault in doing it in the first place. The case was, thus, one of the first type of danger and fault was implied. Moreover, the expression “fault is necessarily implied in the result” – which is taken from *Chalmers* and replicated by the Lord President in *Kennedy* to explain the effect of conduct causing special risk of abnormal damage – is used by Lord Justice-Clerk Moncreiff in *Chalmers* after the assertion that the heap was constructed by the defenders, kept there, took fire and caused damage. No reference is made to the second type of case in connection with implied fault. In this context, the second type is arguably nothing more than an explanation of negligence, where

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<sup>138</sup> *Edinburgh Rly Access & Property* (n 125) at 302.

negligence can, in fact, be proved. The question of whether this negligence *must* be proved, however, was not conclusively answered, as the case did not require such an answer.

*Noble's Trs* neither denies nor confirms this conclusion: the pursuers failed to aver either type of danger and for this reason the case was considered irrelevant. But even if the second type of danger had been averred, liability on the part of the defenders would not have meant that this type ought to be included in conduct causing a special risk of abnormal damage. Liability, in this case, would not have derived from the fact that the defenders created a certain level of danger that makes them liable regardless of any negligence in the traditional sense. Liability would have derived from the fact that they contracted out the execution of the operation that creates such danger, i.e. they would have been liable by virtue of a non-delegable duty of care or, as it was commonly labelled in Scots case law, by virtue of the “*Dalton* exception”. *Dalton* in this context makes reference to the English case of *Dalton v Angus*,<sup>139</sup> where the House of Lords approved Cockburn CJ’s dictum in the English decision of *Bower v Peate*, quoted in *Noble's Trs*:

[A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else – whether it be the contractor employed to do the work from which the danger arises or some independent person – to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.<sup>140</sup>

The principle is called the *Dalton* “exception” because it constitutes an exception to the general rule that excludes liability of the employer for the wrongful acts of an independent contractor.<sup>141</sup>

It will be argued later in this chapter, when post-*Kennedy* case law is discussed,<sup>142</sup> that liability for conduct causing a special risk of abnormal damage and liability by virtue of a non-delegable duty of care, though apparently similar, are conceptually

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<sup>139</sup> *Dalton v Angus* (1881) 6 App Cas 740.

<sup>140</sup> *Bower v Peate* (1876) 1 QBD 321 at 326.

<sup>141</sup> *Stephen v Thurso Police Commissioners* (1876) 3 R 535.

<sup>142</sup> See p 138 below.

distinct and must be treated accordingly. Consequently, the configuration of the scope of application of one of these rules does not necessarily affect the configuration of the other. This distinction, however, was not clearly drawn by Lord Jauncey in *Noble's Trs*, who identified the principle in *Chalmers* with the principle in *Bower*.

Here lies the key to the direction that case law took after *Kennedy*. Lord Jauncey conflated two notions of danger: the danger that justifies that “fault is implied in the result”, as formulated in *Chalmers*, which seems to be only the first type of danger (i.e. danger that cannot be eliminated through any – or due – precautions) and the danger that justifies the imposition of a non-delegable duty, as formulated in *Bower*, which does not seem to be limited to such particular type. Lord President Hope, in supporting the category of conduct causing special risk of abnormal damage in both *Chalmers* and *Noble's Trs*, perpetuated the conflation, and the two notions of danger seem undistinguishable in subsequent case law, to a point that even doctrinally they have been identified: when Cameron expressed that conduct causing special risk of abnormal damage needs to be worked out more fully,<sup>143</sup> he added immediately afterwards that

On the basis of present authorities, it may be stated that where hazardous works are instructed and harm results from the operation, the party instructing the works cannot evade liability by pleading that he engaged a competent contractor to carry out the work. It seems that this form of fault is applicable where there is a very high risk of serious harm. The rule does appear to operate on the cusp of strict liability. It is also a variation on the normal rule of vicarious liability, that one is responsible for the delicts of employees, but not independent contractors.<sup>144</sup>

Accordingly, returning to the question above, i.e. whether the two types of danger distinguished by *Chalmers* and *Noble's Trs* amount to conduct causing special risk of abnormal damage, the most reasonable answer is that they probably do not: only the first one certainly does, namely, only when precautions cannot control the danger. The second type is most likely simply ordinary negligence.

If this is accepted, then the rational way of drawing the line between the two types follows: it must be drawn at due care (and not at *any* care), for this is the

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<sup>143</sup> See n 2 and accompanying text.

<sup>144</sup> Cameron, “Neighbourhood Liability in Scotland 1850-2000” (n 2) at 151.

definitional element of negligence. The category, therefore, begins where due diligence becomes incapable of controlling the risk.

All in all, it seems that *Chalmers* provides a clearer and more accurate description of the conduct in these aspects, which is paradoxical since Whitty himself, in the 2001 reissue of his entry, chose *Noble's Trs* as the judicial description worth transcribing.<sup>145</sup>

A further issue that arises from the analysis of these dicta concerns the quality of the knowledge required on the part of the defender in order to hold him liable. In *Chalmers*, actual knowledge of the dangerous nature of the activity is unnecessary. The point was expressly addressed by Lord Justice-Clerk Moncreiff:

Then, is it necessary that the danger should be known or anticipated? I think the man who brings new materials upon his land is bound to know the nature of these materials. It would be a strange result if the man who knew their nature was liable, while the man who did not know their nature was to escape liability in consequence of his ignorance.<sup>146</sup>

Consequently, if a person develops operations that are dangerous, it is irrelevant whether he actually knows of this danger, because in any case he should know. Now, it is not clear whether the decision admits excusable ignorance as a defence, for even if this paragraph can be read as an absolute exclusion, other sections of the decision seem simply to find the defenders' plea of ignorance, in the circumstances of the case, unconvincing or inexcusable. For instance, Lord Ormidale remarked that

I can hardly take it from the defenders, who have had great experience as iron-masters, and in the working of minerals, that they and their managers, or other head people, were ignorant of the nature of the materials they brought up and heaped in such a mass on the surface of their ground. On the evidence I think they must have known...<sup>147</sup>

The admission of the defence is, to an extent, confirmed by *Noble's Trs*: actual or implied knowledge of the likely consequences is required in order to make the defender liable. But since *Noble's Trs* was concerned with a non-delegable duty, the requirement might not be transferrable.

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<sup>145</sup> Whitty, "Nuisance" (reissue) § 108.

<sup>146</sup> *Chalmers* (n 20) at 464 per Lord Justice-Clerk Moncreiff.

<sup>147</sup> *Ibid* (n 20) at 466.

What is conspicuous by its absence in these formulations is any reference to the magnitude of the damage. Taking the dicta strictly would lead to the result that, aside from the level of likelihood, fault could be inferred from the occurrence of *any* harm, however slight. It would then be essential to pay due attention to the notion of “abnormal damage” included in the definition by Lord President Hope in *Kennedy*, since it seems to have been identified as the key element of the category by subsequent literature, even to the detriment of the likelihood element.<sup>148</sup>

### 2.3. Case law and doctrine after *Kennedy*

As noted, case law on dangerous activities after *Kennedy* has tended to focus upon non-delegable duties of care. This was the main issue in *Powrie Castle Properties Ltd v Dundee City Council*,<sup>149</sup> *Southesk Trust Co Ltd & Elsick Farms Ltd v Angus Council*,<sup>150</sup> *Crolla v Hussain*,<sup>151</sup> *Stewart v Malik*,<sup>152</sup> *Morris Amusements Ltd v Glasgow City Council*,<sup>153</sup> *McManus v City Link Development Co Ltd*,<sup>154</sup> and *Esso Petroleum Co Ltd v Scottish Ministers*.<sup>155</sup> The dangerous nature of the different operations was discussed mostly in order to determine whether there was a basis for imposing liability on employers for the negligence of their independent contractors. The question decided was accordingly, in most of the cases, one of relevancy of the issue against the employer.

Outside the realm of this issue, the development has been limited. Only two Outer House cases have dealt – tangentially – with the matter: *Anderson v White*,<sup>156</sup> and *Viewpoint Housing Association Ltd v City of Edinburgh Council*.<sup>157</sup> Yet these cases share with the previous group the fact that they were about relevancy of the issue. As a

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<sup>148</sup> See p 144 below.

<sup>149</sup> *Powrie Castle Properties Ltd v Dundee City Council* 2001 SCLR 146.

<sup>150</sup> *Southesk Trust Co Ltd & Elsick Farms Ltd v Angus Council* [2006] CSOH 6.

<sup>151</sup> *Crolla v Hussain* 2008 SLT (Sh Ct) 145.

<sup>152</sup> *Stewart v Malik* 2009 SC 265; [2009] CSIH 5.

<sup>153</sup> *Morris Amusements Ltd v Glasgow City Council* 2009 SLT 697; [2009] CSOH 84.

<sup>154</sup> *McManus v City Link Development Co Ltd* [2016] Env LR D1; [2015] CSOH 178 (affirmed in *McManus v City Link Development Co Ltd* 2017 GWD 6-82; [2017] CSIH 12).

<sup>155</sup> *Esso Petroleum Co Ltd v Scottish Ministers* 2016 SCLR 539; [2016] CSOH 15.

<sup>156</sup> *Anderson v White* 2000 SLT 37.

<sup>157</sup> *Viewpoint Housing Association Ltd v City of Edinburgh Council* 2007 SLT 772; [2007] CSOH 114

consequence, in both groups of cases, many of the more difficult questions were left for final resolution after proof, and this stage seems not to have been reached.

Doctrinal developments after the decision have also been limited, yet some important points are underscored, particularly about the scope of the category under discussion.

### 2.3.1. Non-delegable duties of care for dangerous activities

After they were decided, the abovementioned English cases of *Bower v Peate*<sup>158</sup> and *Dalton v Angus*<sup>159</sup> became the main authority in Scotland with regard to liability of employers for the wrongs committed by their independent contractors in the context of neighbourhood and dangerous activities.<sup>160</sup> This liability is based upon what in England has been called a “non-delegable duty of care”.<sup>161</sup> It is not possible to provide here a full account of the many debates that have arisen with regard to the foundations, operation and nature of the liability derived from a non-delegable duty.<sup>162</sup> Consequently, for the purposes of the present discussion, only these general features of this doctrine will be mentioned.

As a general rule, employers are not liable for injuries caused by their independent contractors.<sup>163</sup> Nevertheless, certain groups of “exceptions” to this rule

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<sup>158</sup> *Bower v Peate* (n 140).

<sup>159</sup> *Dalton v Angus* (n 139).

<sup>160</sup> There is earlier Scottish authority supporting liability of employers for the harms caused by their independent contractors in the case of dangerous operations: see e.g. *M'Lean v Russell, Macnee & Co* (1850) 12 D 887 at 892 per Lord Mackenzie and Lord Fullerton.

<sup>161</sup> See, among the recent literature, R Stevens, “Non-Delegable Duties and Vicarious Liability” in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) at 351; J Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) at 381; C Witting, “Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort” (2006) 29 UNSW LJ 33 at 41.

<sup>162</sup> See, besides the materials indicated in the previous note, older accounts such as J A Jolowicz, “Liability for Independent Contractors in the English Common Law - A Suggestion” (1957) 9 Stanford LR 690; and especially P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) ch 29 and 30. See also E McKendrick, “Vicarious Liability and Independent Contractors - A Re-examination” (1990) 53 MLR 770; and J Murphy, “The Liability Bases of Common Law Non-Delegable Duties - A Reply to Christian Witting” (2007) 30 UNSW LJ 86.

<sup>163</sup> This is “trite law”: *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 208 per Lord Bridge. For Scotland, see *Stephen v Thurso Police Commissioners* (n 141).



have been identified:<sup>164</sup> first, cases where the employer has authorised, procured or ratified the wrong; secondly, cases where the employer has been personally negligent, e.g. in selecting a contractor; and thirdly, where he breaches a non-delegable duty.<sup>165</sup>

According to the standard view, the liability imposed on the employer by the non-delegable duty is strict.<sup>166</sup> An examination of the English literature shows, however, a lack of consistency in the mode of justifying the imposition of a non-delegable duty, both generally and in cases such as *Bower* and *Dalton*, where harm to a neighbour derives from operations performed in the defender's property, specifically by withdrawing support.<sup>167</sup> One justification that has been traditionally advanced is risk: an employer cannot escape liability by contracting out of the execution of dangerous operations, and the operations in *Bower* and *Dalton* are framed in this way: withdrawal of support is an operation that “naturally” (as in *Bower*) or “necessarily” (as in *Dalton*) creates a risk to neighbours.<sup>168</sup> Beyond the particular context of withdrawal of support, the “modern foundation”<sup>169</sup> for the imposition of non-delegable duties in the case of “inherently hazardous” activities can be found more generally in the case of *Honeywill & Stein Ltd v Larkin Bros Ltd*.<sup>170</sup>

This is the justification that has been generally adopted by Scots case law in the context of neighbour disputes, in cases such as *Duncan's Hotel (Glasgow) Ltd v J & A*

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<sup>164</sup> It is arguable that they are not “true” exceptions, for they are based on duties that are personally owed by the employer: *D&F Estates Ltd v Church Commissioners for England* (n 163) at 208 per Lord Bridge, approving J F Clerk and W H B Lindsell, *Clerk & Lindsell on Torts* (R W M Dias ed, 15th edn, 1982) § 3-37. In a similar sense, Walker, *Delict* 155.

<sup>165</sup> C Witting (ed), *Street on Torts* (14th edn, 2015) 643-649. For Scotland, Walker, *Delict* 155-162 provides a longer list of exceptions (9), but he acknowledges at 155 that the classes are not clearly settled and they might be explained under more than one head. Indeed, all these exceptions can be classified under one of the three categories identified by Witting.

<sup>166</sup> R F V Heuston and R A Buckley (eds), *Salmond & Heuston on the Law of Torts* (21st revised edn, 1996) 463; Stevens (n 161) at 331; P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (2010) 116; and Witting, *Street on Torts* (n 165) 645. For Scotland, see Reid, “Liability for Dangerous Activities: A Comparative Analysis” (n 18) at 753; and Cameron, “Neighbourhood Liability in Scotland 1850-2000” (n 2) at 152. For a different view, see Murphy, “The Liability Bases of Common Law Non-Delegable Duties - A Reply to Christian Witting” (n 162).

<sup>167</sup> Liability for breaching a non-delegable duty in the specific context of withdrawal of support is explored in chapter 5 section 3.

<sup>168</sup> This is the justification proposed by Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” (n 161) at 381-382.

<sup>169</sup> Stevens (n 161) at 343.

<sup>170</sup> *Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191, esp at 200-201.

*Ferguson Ltd*,<sup>171</sup> *Noble's Trs*,<sup>172</sup> *Borders Regional Council v Roxburgh District Council*<sup>173</sup> and *G A Estates Ltd v Caviapen Trustees (No 1)*,<sup>174</sup> and most of the cases decided after *Kennedy*,<sup>175</sup> although the terminology of “non-delegable duty” is adopted by courts only in some of the most recent cases.<sup>176</sup>

The question that arises for our purposes is whether, in framing the nature and scope of liability for conduct causing a special risk of abnormal damage, we can rely on decisions that are concerned with liability based upon non-delegable duties, for the former is imposed on people *engaging* in dangerous operations, whereas the latter is imposed on people *instructing* those operations.

Arguably, the question is irrelevant in practical terms: nowadays, no one would engage personally in dangerous operations; people simply hire competent professionals to perform them, and this is clearly reflected on the fact that recent case law on dangerous activities is mostly concerned, precisely, with non-delegable duties. Consequently, what really matters is liability for non-delegable duties, and not liability for conduct causing a special risk of abnormal damage. The latter, however, preserves its practical importance mainly for defenders whose course of business includes dangerous operations. Moreover, it is still relevant to clarify the rule for those factual settings where, for whatever reason, contractors are not employed.

At first sight, imposing strict liability on the landowner that entrusts dangerous operations to a competent independent contractor yet subjecting the same person to a fault-based liability rule when he chooses to do without one might seem anomalous. It even seems counterintuitive: it would entail subjecting the more dangerous choice to the less stringent liability rule. It is, indeed, because of this anomaly that the strict nature of the liability imposed by non-delegable duties has been challenged in England. Since case law has rejected a general strict liability rule for ultra-hazardous

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<sup>171</sup> *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd* 1974 SC 191 at 196.

<sup>172</sup> *Noble's Trs* (n 127) at 663.

<sup>173</sup> *Borders Regional Council v Roxburgh District Council* 1989 SLT 837 at 839.

<sup>174</sup> *G A Estates Ltd v Caviapen Trustees (No 1)* 1993 SLT 1037 at 1042.

<sup>175</sup> See above p 134.

<sup>176</sup> *Morris Amusement Ltd* (n 153) at § 45; and *McManus v City Link Development Co Ltd* (n 154) at §§ 35 and 43.

activities,<sup>177</sup> “[i]t seems insupportable that a defendant will be held strictly liable for the extra-hazardous activity of an independent contractor, when it would not be so liable if it carefully carried out the same activity itself”.<sup>178</sup>

It is possible to argue, however, that this inconsistency is only apparent, and that the fact that strict liability is imposed on the landowner who has instructed dangerous operations does not necessarily justify the imposition of an equivalent rule if he engages in the operations personally, for the distribution of risks performed by the liability rule in both cases is different.

The rule imposing liability onto a defender that has personally engaged in the dangerous operation distributes the consequences of risks *between pursuer and defender*. In the case of liability derived from the non-delegable duty, in turn, the rule seeks to distribute the consequences of risk *between potential defenders*, that is, the employer and the independent contractor, *vis-à-vis* the pursuer: if the contractor was negligent, the pursuer will obtain reparation, either from the contractor, proving his negligence, or from the employer, without the need to prove his negligence. But the employer could eventually recover from the negligent independent contractor: apart from any indemnities that might be provided for in the contract between employer and contractor, they can be considered as joint wrongdoers and, for this reason, jointly and severally liable.<sup>179</sup>

This subjects them in England to the rules on recovery of contribution contained in the Civil Liability (Contribution) Act 1978, and in Scotland to the relief rules contained in s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. According to these rules, the employer could, theoretically, recover from the contractor the entire amount paid as damages to the pursuer: in both countries, it is for the courts to assess the contribution according to what they deem just, and the

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<sup>177</sup> *Read v Lyons & Co Ltd* (n 71); *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264; and more recently *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1; [2003] UKHL 61.

<sup>178</sup> Stevens (n 161) at 344.

<sup>179</sup> See, for England, J F Clerk and W H B Lindsell, *Clerk & Lindsell on Torts* (M A Jones and A M Dugdale eds, 21th edn, 2014) § 4-04 and 4-30; and S Deakin, A C Johnston and B S Markesinis (eds), *Markesinis and Deakin's Tort Law* (7th edn, 2013) 880. Witting, *Street on Torts* (n 165) does not categorise the relation employer/independent contractor in his classification, but it seems that they would be, at least, concurrent tortfeasors (661), which would subject them to the same contribution rules applicable to joint tortfeasors (666). For Scotland, see Walker, *Delict* 163 and 425.

English provision refers specifically to “the extent of the person’s responsibility for the damage in question” as the main criterion to determine what is just and equitable.<sup>180</sup> The English statute explicitly allows for this contribution to result in a complete indemnity,<sup>181</sup> and the possibility is not excluded in its Scottish counterpart. Walker argued that the employer can, in fact, recover the entire compensation from the contractor provided that the former was himself completely blameless and the latter is solvent,<sup>182</sup> and referred to a case where this recovery was allowed: *McIntyre v Gallacher*.<sup>183</sup> In this case, the proprietor of a house had been held liable for damage caused to the house below by an overflow of water originated in his house. The cause of this overflow was proved to be an insecurely closed pipe due to the negligence of a plumber that the proprietor had employed to repair the pipes in the house and, for this reason, the proprietor was allowed to recover from the plumber the compensation paid.

In sum, the rationale justifying the shift of the allocation of risks in one case might not be readily transferable to the other and, consequently, both the nature and scope of these liability rules do not need to be determined identically. It is reasonably arguable that the law can be more “generous” with victims in the context of non-delegable duties, where the defender has means of eventually recovering from the wrongdoer at fault. As a result, liability for conduct causing a special risk of abnormal damages does not have to be strict simply because liability by virtue of a non-delegable duty is strict. Likewise, the scope of the first rule does not need to coincide with the scope of the second rule, so if a non-delegable duty can be imposed even in cases where danger can be controlled by due care (i.e. the second type of danger identified above<sup>184</sup>), it does not mean that the category of conduct causing a special risk of abnormal damage should extend to those cases.

For these reasons, most cases decided after *Kennedy* provide little or no material upon which we can rely in trying to determine the nature and scope of the rule under

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<sup>180</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s 3(2); Civil Liability (Contribution) Act 1978 s 2(1).

<sup>181</sup> Civil Liability (Contribution) Act 1978 s 2(2).

<sup>182</sup> Walker, *Delict* 425.

<sup>183</sup> *McIntyre v Gallacher* (1883) 11 R 64.

<sup>184</sup> See p 128 above.

analysis in this chapter: they were concerned with liability of people *instructing* dangerous operations, not *engaging* in them. Evidently, in all these cases *someone* was engaging in the activities and not merely instructing them: the contractors. But the discussion was not about the grounds for their liability. The only aspect that was decided in these cases was the relevancy of the averments against the person instructing them.

### 2.3.2. Other cases

Apart from the context of the employer's liability for the harms caused by an independent contractor, only two additional cases, decided by the Outer House, have dealt with the issue of dangerous activities after *Kennedy*.

The first case is *Anderson v White*,<sup>185</sup> a decision that was considered in chapter 2 with regard to the case of intentional or reckless nuisance against the third defender, proprietor of the land at the time of the claim, for allowing the water level behind a dam to rise so as to cause a flood on the pursuer's property.<sup>186</sup> The pursuers claimed damages for nuisance also against the second defender, trustee of the former proprietor of the land, by whose disposition the third defender became proprietor but who also retained the right to issue instructions to the latter and, therefore, to control his operations. The court held that *culpa* ought to be established and that, for those purposes, the pursuers required to aver

first that the operations were either likely to cause damage to their land however much care was exercised, or were such that it was necessary to take steps in the carrying out of those operations to prevent damage to their land, and secondly, that the damage was foreseeable.<sup>187</sup>

As to the first requirement, the pursuers averred the first alternative, i.e. that the operations were likely to cause damage regardless of the level of care deployed; and with regard to the second requirement, namely foreseeability, they averred that the

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<sup>185</sup> *Anderson* (n 156).

<sup>186</sup> See pp 61 and 85 above.

<sup>187</sup> *Anderson* (n 156) at 42.

second defenders had been informed of what was happening and that, in any case, the occurrence of the harm was obvious. Thus, the issue was regarded relevant as an averment of fault.<sup>188</sup>

It is rather clear that this is not an averment of negligence, for no submissions are made about the standard of care or its breach. There are, consequently, two alternative explanations for the conclusion that creating such risk amounts to fault: either the court saw the case as one of intention or recklessness, or considered that the sole creation of the risk, coupled with foreseeability of harm, amounted to a different form of fault. The language used by the court with regard to the averments of fault of the third defenders, which basically reproduced the notions of intention and recklessness contained in *Kennedy*, stands in contrast with the one used here (regarding the second defenders), which reproduces the distinction contained in *Chalmers* and *Noble's Trs*. It seems more plausible, therefore, to infer that the court took the second approach. If this is correct, we can conclude that the case was one of application of the special rule under discussion in this chapter, even though the court neither referred specifically to conduct causing a special risk of abnormal damage nor mentioned *Kennedy* when discussing the second defender's liability.

The conclusion that arises from this decision as to the nature of the liability rule is rather evident: the case continues the *Kennedy* analysis of the rule in fault terms. Unfortunately, the decision does not tell us much about the scope of the category we are trying to delineate. First, it does not tell us whether, had the pursuers framed their averments in the second alternative of the first requirement, that is, that the operations were "such that it was necessary to take steps...", this would have been enough to establish fault or, indeed, the pursuers would have needed to prove, additionally, that those steps were not taken, i.e. to prove negligence in the ordinary sense. In other words, the case does not tell us whether the second type of danger falls to be treated in the same way as the first type, because the pursuer's averments were framed in the latter. Secondly, the case does not tell us anything about the other elements of this risk, e.g. whether there is a requirement of magnitude of harm. What the case does tell us, however, is that harm must be foreseeable.

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<sup>188</sup> Ibid.

The second case is *Viewpoint Housing Association Ltd v City of Edinburgh Council*.<sup>189</sup> In this case, the pursuers suffered damage to their property as a consequence of a flood. The cause of the flood was, in the pursuers' view, the inadequacy of the culverting arrangements constructed by the former roads authority on the burn located nearby. They sought compensation from the new roads authority, now owners, possessors and controllers of the works.

In his decision, the Lord Ordinary (Emslie) suggested, apart from the negligence case, the possibility of a strict liability case based on the interference with the natural flow of a watercourse. The pursuers averred that, if fault could not be proved, they still had a case based on strict liability open. Such possibility, however, was excluded from the case by reference to the state of the pleadings. "If pursuers wished to maintain such a fallback argument", he submitted, "an appropriate minute of amendment would be required".<sup>190</sup> It seems, therefore, that a case of strict liability, arguably based on the rule in *Caledonian Rly Co*,<sup>191</sup> could have been possible if the averments were adequate and gave fair notice to the defenders. The scope of application of this alleged special liability rule was, consequently, defined by reference to the specific factual pattern present in the *Caledonian Rly Co* case which, as has been explained, is seen as an exceptional case of strict liability that is based upon the infringement of the rights of riparian owners,<sup>192</sup> view that is considered and challenged in chapter 4.<sup>193</sup> In this context, the decision in the *Viewpoint Housing Association* case does not contribute significantly to the delineation of the category beyond confirming what we already know: that interference with the natural course of a stream attracts strict liability.

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<sup>189</sup> *Viewpoint Housing Association* (n 157).

<sup>190</sup> *Ibid* at § 22.

<sup>191</sup> *Caledonian Rly Co v Greenock Corp* (n 32).

<sup>192</sup> See p 122 above.

<sup>193</sup> See chapter 4 section 3.

### 2.3.3. Some doctrinal insights

Even though case law after *Kennedy* sheds almost no light on the problematic aspects of this rule, legal literature leaves us in a slightly better position, for it discussed one important definitional element of the category: gravity of the potential harm.

The view about the nature of the rule remains largely unchanged: it is still generally considered as a fault-based liability rule.<sup>194</sup> This is not surprising given that *Kennedy* itself proclaims that liability for conduct causing a special risk of abnormal damage is fault-based. The explanation of liability still relies on substantive and evidentiary elements of negligence.<sup>195</sup>

Reid proposed a way of dealing with dangerous activities that is more nuanced than the orthodox view: she distinguishes accumulation of substances that are intrinsically dangerous from the accumulation of substances that are not intrinsically dangerous. In the first type of accumulation (i.e. the *Chalmers* type of case) liability is explained by a heightened duty of care that is very easily breached, and where the pursuer can invoke the *res ipsa loquitur* doctrine.<sup>196</sup> In the second type (i.e. the *Kerr* type of case), a rebuttable presumption of fault operates. This presumption, however, seems to stem equally from the *res ipsa loquitur* doctrine.<sup>197</sup> Consequently, there is significant common ground between the explanations for both types of cases and the nuance tends to disappear. Further, it is not clear how “non-accumulation” cases are to be classified, i.e. dangerous activities that do not entail the storage and subsequent escape of a substance.

This understanding of liability in negligence terms is consistent with Reid’s scepticism about the need for conduct causing a special risk of abnormal damage as a separate category,<sup>198</sup> a point that seems to be conceded by Whitty, referring to Lord

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<sup>194</sup> See E Reid, “The Basis of Liability in Nuisance” [1997] JR 162 at 174; G D L Cameron, “Nuisance in the Common Law of Scotland” (1998) 3 SLPQ 1 at 7; Reid, “Liability for Dangerous Activities: A Comparative Analysis” (n 18) at 747-748; Whitty, “Nuisance” (reissue) § 108.

<sup>195</sup> Cameron, “Nuisance in the Common Law of Scotland” (n 194) at 7; Whitty, “Nuisance” (reissue) § 108.

<sup>196</sup> Reid, “Liability for Dangerous Activities: A Comparative Analysis” (n 18) at 748.

<sup>197</sup> Ibid at 748-749.

<sup>198</sup> Reid, “The Basis of Liability in Nuisance” (n 194) at 174.



Hope's suggestion that it can actually just be recklessness.<sup>199</sup> What is noteworthy about these remarks is that they draw a question mark over the category, underscoring its somewhat odd character as a form of fault.

There is only one author that identifies in *Kennedy's* implied fault what "to all intents and purposes" is a strict liability rule,<sup>200</sup> but then suggests that *Chalmers*, the authority upon which this implication fault is based, "does not represent the law of Scotland", for it is in his view an unwarranted extension of the strict liability rule applicable to *opera manufacta* on water courses.<sup>201</sup>

With regard to the scope of the category, doctrinal writings highlight what had been absent from previous formulations of the required risk: the element of *abnormal* damage. Whereas Reid explains that this conduct is classified by reference "to the gravity of the possible harm",<sup>202</sup> Whitty acknowledged that conduct causing a special risk of abnormal damage

is an impure taxonomic category because, unlike the other forms of *culpa* which form a series or continuum of types of conduct defined by reference to the pursuer's mental element, this has reference to the gravity of the possible harm suffered by the defender not to the pursuer's mental element and therefore belongs to a different classificatory series.<sup>203</sup>

This view entails imposing a minimum gravity threshold on the category. As a consequence, conduct that creates a very high likelihood of harm will not fall within its scope if this likely harm is not material enough. It is not clear, however, where this threshold is to be placed, that is to say, no indications are provided to determine where to draw the line between the "normal" and the "abnormal".

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<sup>199</sup> Whitty, "Nuisance" (reissue) § 108.

<sup>200</sup> F McManus, "Liability for *Opera Manufacta* in Scots Law" [1998] JR 281 at 281.

<sup>201</sup> Ibid at 298.

<sup>202</sup> Reid, "The Basis of Liability in Nuisance" (n 194) at 174.

<sup>203</sup> Whitty, "Nuisance" (reissue) § 108.

## 2.4. Conclusion

This section has discussed both the authority that serves as the source for conduct causing a special risk of abnormal damage as described by *Kennedy*, and the subsequent case law and legal literature. It can be concluded from this discussion that the sources and subsequent materials are not consistent in that they lead to different views about the category, with regard to both its nature and scope. Further, many of these sources are connected to or directly rely on the *Rylands* rule, which is problematic given its general exclusion in *RHM Bakeries*. In addition, an important section of the cases that deal with dangerous activities are of no aid, for they are concerned with a related yet different basis of liability: non-delegable duties of care. The latter issue is particularly pervasive in case law after *Kennedy*.

Possibly the one aspect of the regime that is nowadays widely agreed by both courts and scholars is the fault-based nature of the liability that this type of conduct attracts. This underplays the relevance of determining the scope of the category. After *Kennedy*, however, it is possible to see a renewed doctrinal interest in this definition, but this interest does not go as far as providing a full outline of what conduct causing a special risk of abnormal damage is.

## 3. THE NATURE OF THE RULE: A STRICT LIABILITY ACCOUNT

The previous section shows that, despite the different views about the category under analysis, the explanation of the nature of the liability rule has reached a rather stable conclusion: liability is, at least conceptually, fault-based. There is, however, an equally stable acknowledgement of the idea that, in practice, the conceptual nature of the rule might not make a big difference in result: liability in these cases “behaves” like strict liability, even if it is not. If this is the case then, the question that arises is whether this is not just “strict liability in disguise”, as suggested by Zimmermann and Simpson.<sup>204</sup>

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<sup>204</sup> R Zimmermann and P Simpson, “Liability among Neighbours” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) at 631.

An analysis of the rule shows that the answer to the question is, indeed, affirmative: liability for this type of activity seems to be not just *stricter-than-normal*, in the sense discussed in chapter 1, but actually *strict*.<sup>205</sup> On the one hand, a survey of the identifiable elements of the rule according to the current authority and literature points strongly towards the presence of a truly strict liability rule (section 3.1). On the other hand, the standard explanation of this rule as fault-based features some shortcomings that are difficult – if not impossible – to overcome, rendering the explanation rather unconvincing. This conclusion highlights the paramount relevance of defining the boundaries of the rule’s scope of application (section 3.2).

### 3.1. An analysis of the rule

A good starting point is to contrast the elements and effects of this regime with those that have been identified as the determining elements and effects of strict liability. If we can find a coincidence, then the preliminary conclusion is that we are likely dealing with a strict liability regime. For these purpose, the frame of reference is that developed in chapter 1, where the notions of fault-based, stricter-than-normal and strict liability are outlined.

#### 3.1.1. Proof of fault

The authority considered so far is consistent in recognising that according to the liability regime under analysis, the pursuer does not have to prove fault in the ordinary way in order to obtain compensation. Lord President Hope in *Kennedy* identified this as the main effect of conduct causing a special risk of abnormal damage: “it is not necessary to prove a specific fault as fault is necessarily implied in the result”;<sup>206</sup> “fault is implied if damage results from that conduct”.<sup>207</sup>

This element is consistent both with a strict liability rule and with a fault-based liability rule. In a strict liability rule, since fault is imposed regardless of fault,

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<sup>205</sup> See chapter 1 section 3.

<sup>206</sup> *Kennedy* (n 1) at 99.

<sup>207</sup> *Ibid* at 100.

obviously fault does not have to be proved by the pursuer to obtain compensation. But a fault-based liability rule can also be stricter in this way,<sup>208</sup> facilitating compensation for the pursuer by shifting the burden of proof of fault and, consequently, imposing on the defender the task of demonstrating that he was not at fault, i.e. that he did not have the mental disposition and/or knowledge required by intention and recklessness, or, more commonly, that he employed the level of care that was due according to the circumstances. This is the effect of a rebuttable presumption of fault. Consequently, the fact that fault does not have to be proved only leaves us within the range of stricter forms of liability.

### 3.1.2. Defences: absence of fault.

We turn, then, to what was identified in chapter 1 as the key defining element of a strict liability rule: the admissibility of absence of fault as a defence.

The relevant authority does not provide a clear answer to the question of whether absence of fault is an admissible defence in these cases. Often cited is Lord Justice-Clerk Hope's dictum in *Kerr* where he remarked that it was "not sufficient that [the defender] took all the pains which were thought at the time necessary and sufficient",<sup>209</sup> and that he was "not prepared to say that any proof of the skill and care with which a new operation was conducted will be relevant...".<sup>210</sup> These remarks have been construed as a clear exclusion of the defence of absence of fault.<sup>211</sup> A more recent view, however, holds the opposite interpretation: in Reid's opinion, what operated in *Kerr* was a rebuttable presumption of fault by virtue of the *res ipsa loquitur* doctrine, a conclusion that stems from the Lord Ordinary's judgment.<sup>212</sup> In this view, Lord Justice-Clerk Hope's words can be explained by the fact that, in the case, the lack of care was so evident – and so he underlines by highlighting that the defender did not obtain advice from the adequate professionals

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<sup>208</sup> See chapter 1 section 3.4.

<sup>209</sup> *Kerr* (n 30) at 302.

<sup>210</sup> *Ibid* at 303.

<sup>211</sup> See, e.g. Clive (n 35) at 257; K W B Middleton, "Liability without Fault" [1960] JR 72 at 76; Walker, *Delict* 989.

<sup>212</sup> Reid, "Liability for Dangerous Activities: A Comparative Analysis" (n 18) at 749. The relevant paragraph of the Lord Ordinary's decision is quoted above: see n 37.

nor had proper plans<sup>213</sup> – that any discussion of diligence was pointless. It appears, however, that there are better reasons to support the unavailability of the defence.

First, the rest of the authority seems to point towards the exclusion of the defence. In *Chalmers*, both Lord Justice-Clerk Moncreiff and Lord Ormisdale treated the issue of precautions as relevant only if fault had to be proved. The former submitted that “[f]ault is necessarily implied in the result, and it is unnecessary to go further”, to discuss the defenders’ (lack of) precautions only “if [he] were called to decide the question of fault”. The latter judge not only followed a similar argument, but actually quoted Lord Cranworth’s dictum from *Rylands* that specifically establishes the irrelevance of care as a defence.<sup>214</sup> In *Noble’s Trs*, in turn, there was no discussion about precautions simply because the pursuers failed to aver the type of risk that, in the court’s view, was necessary to make a relevant averment of fault. Yet it is remarkable that, like in *Chalmers*, when risk cannot be controlled by due care (i.e. the first type of risk<sup>215</sup>), fault is located in the act of engaging in the dangerous activity itself; “the landowner’s *culpa* lies in the actual carrying out of his operations”.<sup>216</sup> This stands in contrast with the case where risk can be controlled by due care, in which fault lies in not taking such care. Other cases where the rule was identified as applicable explicitly acknowledge that the defender is liable if harm is caused even if he used “the utmost care”;<sup>217</sup> “however careful he might have been”.<sup>218</sup>

These remarks lead to the second reason why absence of fault is not – or should not be – available as a defence. Fault is said to lie in engaging in the dangerous conduct precisely because due care is ineffective in controlling danger. Admitting due care as a defence defeats the very purpose of identifying fault in the act of engaging in this type of danger. The logical way of demonstrating absence of fault in this context should be to prove that the defender did not engage in a conduct that creates the type of danger required, i.e. to challenge the applicability of the rule.

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<sup>213</sup> *Kerr* (n 30) at 302-303.

<sup>214</sup> *Chalmers* (n 20) at 466. The relevant paragraph of Lord Cranworth’s dictum is quoted above: see n 45.

<sup>215</sup> See p 128 above.

<sup>216</sup> *Noble’s Trs* (n 127) at 664. In the same sense, *Anderson* (n 156) at 42.

<sup>217</sup> *Western Silver Fox Ranch* (n 68) at 605.

<sup>218</sup> *Blair v Springfield Stores Ltd* (1911) 27 Sh Ct Rep 178 at 182.

It is true that in Reid's view, the defence would be admissible only in the *Kerr* type of cases, namely accumulation of substances that are not intrinsically dangerous, and not in the *Chalmers* type of case.<sup>219</sup> The rule in *Kerr*, however, has been not only widely identified with the rule in *Chalmers*, but actually identified specifically as the appropriate authority in cases where the substance that caused the harm could be described as intrinsically dangerous: pesticides<sup>220</sup> and explosives.<sup>221</sup> Moreover, as it has been remarked above,<sup>222</sup> the presumption of fault in both types of case seems to stem from the same source, so defences should be consistent across both groups.

### 3.1.3. Knowledge of danger and foreseeability of harm

Overall, the authority seems to be consistent in that some element of knowledge and/or foreseeability is required. It is not entirely clear, however, what the object of that knowledge or foreseeability is.

Some cases focus on the knowledge – actual or implied – of the *danger*: the defender will be liable without proof of fault provided that he knows, or at least ought to know, that the activity he is carrying out or the substance he is storing entails the level of required danger. This means knowing the extent of the potential harm and the level of likelihood of its occurrence. This is the case, for instance, in the decisions in *Chalmers*<sup>223</sup> and *Blair v Springfield*.<sup>224</sup> Other cases, however, concentrated on foreseeability of the *consequences*, i.e. the harm suffered by the victim must be foreseeable at least in nature. Its extent and level of likelihood are not relevant. Examples can be found in the cases of *Western Silver Fox*,<sup>225</sup> *Noble's Trs*,<sup>226</sup> and very clearly *Anderson v White*.<sup>227</sup>

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<sup>219</sup> See p 143 above.

<sup>220</sup> *D McIntyre & Son Ltd v Soutar* (n 41).

<sup>221</sup> *Western Silver Fox Ranch* (n 68).

<sup>222</sup> See p 143 above.

<sup>223</sup> *Chalmers* (n 20).

<sup>224</sup> *Blair v Springfield Stores Ltd* (n 218).

<sup>225</sup> *Western Silver Fox Ranch* (n 68).

<sup>226</sup> *Noble's Trs* (n 127).

<sup>227</sup> *Anderson* (n 156).

Arguably the distinction is not relevant, for one implies the other: if there is knowledge – actual or implied – of the danger, then subsequent harm is foreseeable, and conversely, if harm is foreseeable, it entails that the dangerousness of its source must have been known or knowable. The second proposition is, however, not correct, and the best example is *Rylands* itself: in that case, even though harm was foreseeable *if* there was an escape, the escape was not,<sup>228</sup> highlighting that one does not necessarily imply the other.

For the purposes of this section, we do not need to answer whether the regime under analysis requires knowledge of danger, foreseeability of harm, or both. What we need to answer here is whether an affirmative answer implies necessarily that the liability rule is fault-based or, on the contrary, they are compatible with a strict liability regime. And the answer was provided in chapter 1's discussion of the notion of strict liability: requiring foreseeability of harm, or requiring the knowledge of the level of risk of an activity, does not mean that the liability rule is fault-based.<sup>229</sup> This, however, is a distinct question from whether engaging in a particularly dangerous activity, with or without knowledge of its nature, can be considered as a form of fault in itself.<sup>230</sup>

#### 3.1.4. The rule's "behaviour"

The analysis developed so far shows that the elements of the liability rule under discussion coincide with those of a strict liability rule. Proof of fault is not only not required, but proof of absence of fault is not an admissible defence, and the requirement of foreseeability of harm and/or knowledge of danger does not preclude this conclusion.

The rule, in sum, "behaves" like a strict liability rule. This, however, did not prevent some commentators from explaining it in terms of fault.

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<sup>228</sup> P Cane, *The Anatomy of Tort Law* (1997) 49; R A Epstein, *Torts* (1999) 345. See, however, *Transco Plc v Stockport Metropolitan Borough Council* (177) at § 10 per Lord Bingham. See, however, G T Schwartz, "Rylands v Fletcher, Negligence, and Strict Liability" in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 217, arguing that the escape must have also been foreseeable at the time.

<sup>229</sup> See p 22 above.

<sup>230</sup> See section 3.2.5 below.

### 3.2. The shortcomings of the fault-based account

As has been stated, the orthodox view does not argue that the rule behaves differently from a strict liability rule. The position is best summarised by the Law Reform Committee's conclusion, cited by Lord Fraser in *RHM Bakeries*,<sup>231</sup> that "it seems to make little, if any, difference in the result whether one adopts what may be called the 'absolute liability' theory or adheres rigidly to the fault principle".<sup>232</sup> Yet the orthodox view explains this seemingly strict liability rule using elements of fault-based liability, particularly of negligence.

There are, however, some flaws in this reasoning that render this explanation rather unconvincing.

#### 3.2.1. High or heightened standard of care?

The first element that is deployed to explain this liability rule as fault-based, and that is present in most accounts, is the inherent sensitivity of negligence's standard of care to risk: an activity that creates a very high level of risk will result in a very high standard of care. This is indeed one of the cases of "stricter-than-normal" liability identified in chapter 1,<sup>233</sup> and also the explanation offered by Weinrib to make strict liability for this type of activity compatible with the requirement of fault demanded by his corrective justice justification of liability. "[T]here must be a point", he argues, "where activity is sufficiently risky that lack of care can be imputed from the very materialization of the risk".<sup>234</sup> This is why, in his view, the defendant cannot invoke lack of fault.

It must be noted that this explanation relies on a generalisation, for the standard of care depends mainly, but not exclusively, on the level of risk. The standard is determined by a series of factors, among which an important role is

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<sup>231</sup> *RHM Bakeries* (n 4) at 45.

<sup>232</sup> Law Reform Committee for Scotland (n 81) § 22.

<sup>233</sup> See chapter 1 section 3.3.

<sup>234</sup> E.J. Weinrib, *The Idea of Private Law* (revised edn, 2012) 188.



played by the costs of taking precautions. If these costs are too high in relation to the improvement achieved by taking them in terms of safety, and especially when activities are considered as socially useful or valuable,<sup>235</sup> then due care might not necessarily be equal to all care. It would, in sum, depend on the circumstances of each case whether the standard of care is high enough so as to make this alleged fault-based liability rule behave as a strict liability one. Weinrib argues that costs of taking precautions are largely ignored by English and Commonwealth courts,<sup>236</sup> so the standard of care would, in his view, depend exclusively on risk. Yet a recent study has sought to show that “Weinrib is badly mistaken here about the state of the law”,<sup>237</sup> giving examples of cases where the cost of precautions has, indeed, been taken into account.<sup>238</sup> The contention is applicable to Scots law: Walker provides a list of cases that serve as authority for the proposition that “the expense and difficulty or practicability of taking certain precautions against a foreseen risk can be taken into account”.<sup>239</sup>

As a consequence, mere reliance on the standard’s sensitivity to risk might lead to a level of care that is just not high enough so as to imply negligence from the fact that harm happened. It would be necessary to resort to the notion of “highest possible” or “utmost” care.<sup>240</sup> In this case, where the standard of care is placed so high that it is virtually impossible to comply with, that is to say, *due care* becomes *all care* so “nothing short of not doing the act is an adequate precaution”,<sup>241</sup> then there is no difference in practice with a rule of strict liability, it is “tantamount to strict liability”.<sup>242</sup>

But for cases where the standard of care, though very high, is not high enough to reach this point, the explanation is, therefore, not sufficient: there is still a need to

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<sup>235</sup> P Cane, *Atiyah’s Accidents, Compensation and the Law* (8th edn, 2013) 41-42.

<sup>236</sup> Weinrib (n 234) at 148.

<sup>237</sup> J Goudkamp and J Murphy, “The Failure of Universal Theories of Tort Law” (2015) 21 Legal Theory 47 at 57.

<sup>238</sup> Ibid at 58.

<sup>239</sup> Walker, *Delict* 204. Some more recent cases can be found in Thomson, *Delict* § 5.15.

<sup>240</sup> See p 25 above.

<sup>241</sup> Gow (n 74) at 25.

<sup>242</sup> W W McBryde, “The Advantages of Fault” [1975] JR 32 at 40.

prove that the standard was actually breached, even if this breach entails a slight lack of care.

### 3.2.2. High standard of care + *res ipsa loquitur*

The issue is solved by the orthodox view normally through the idea of *res ipsa loquitur*: the fact that harm resulted is evidence of this (slight) lack of care.

As explained in chapter 1,<sup>243</sup> *res ipsa loquitur* does not amount to a proper presumption of negligence. A presumption of negligence places on the defender the burden of proving diligence, whereas *res ipsa loquitur* simply charges him with the burden of proposing an alternative explanation of the accident that is compatible with diligence, throwing the burden of proof of negligence back onto the pursuer. Consequently, this is a weak explanation for a rule that behaves like strict liability and that, therefore, relieves the pursuer from proving fault. He might, indeed, see himself in the need of proving fault after all, if the defender can provide the aforementioned explanation.

But there is a more fundamental flaw in the reasoning: one of the essential elements of *res ipsa loquitur* is incompatible with the type of activity that is characterised as conduct creating risk of abnormal damage, i.e. that in which due care cannot control the risk.<sup>244</sup> *Res ipsa loquitur* operates when the accident is one that, in the ordinary course of things would not have happened if the defender had used proper care.<sup>245</sup> Therefore, if the activity is one where due care cannot control the risk, it is not possible to assert at the same time that harms derived from this activity are, in the normal course of things, due to lack of proper care. At least in two of the cases mentioned by Reid in support of the *res ipsa*-based explanation,<sup>246</sup> the court explicitly recognised that danger was controllable through adequate precautions. In *Nautilus Steamship Co v David and William Henderson Co*, Lord Skerrington remarked that “the operation was obviously one which would be dangerous, unless precautions

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<sup>243</sup> See p 28 above.

<sup>244</sup> See p 129 above.

<sup>245</sup> See p 28 above.

<sup>246</sup> Reid, “Liability for Dangerous Activities: A Comparative Analysis” (n 18) fn 105.

were taken”,<sup>247</sup> whereas in *Gilmour v Simpson*, the Lord Ordinary qualified the instrument used by the defenders as “a potentially dangerous instrument, if care was not duly exercised”.<sup>248</sup> In the third case mentioned by Reid, *Fitzpatrick v Melville*, though there is no explicit recognition, the facts can easily be characterised as such.<sup>249</sup>

It is true that the restriction of the category only to those cases where due care cannot control the risk is part of this thesis’ argument. But even if we accept a wider category that includes also those cases where it is necessary to take steps to prevent risk, this merely turns the *res ipsa loquitur* explanation from completely inadequate to partially inadequate.

At a more general level, *res ipsa* operates only when the accident is unexplained,<sup>250</sup> so it is, again, an unwarranted generalisation to assume that in the type of cases under analysis, the accident will always be unexplained.

As a consequence, *res ipsa loquitur* is not a convincing explanation for presuming the breach. Some other explanation is needed to keep the rule within the bounds of fault-based liability.

### 3.2.3. High standard of care + presumption of negligence

An alternative explanation would be that there is a proper presumption of negligence in operation. However, no account is clear as to the nature and source of this presumption. In any case, the key question would then be whether the presumption can be rebutted. And if this is not the case, then it is difficult to see in what sense this remains a fault-based rule.<sup>251</sup> The view is not new: around the same time the orthodox view was consolidating, a dissenting voice pointed out the inadequacy of the explanation of *Kerr*, *Chalmers* and *Caledonian*:

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<sup>247</sup> *Nautilus Steamship Co v David and William Henderson Co* 1919 SC 605 at 609.

<sup>248</sup> *Gilmour v Simpson* 1958 SC 477 at 479.

<sup>249</sup> *Fitzpatrick v Melville* 1926 SLT 478.

<sup>250</sup> See p 28 above.

<sup>251</sup> See p 26 above.

If strict liability amounts to no more than an inference or presumption of negligence, then it must be a good defence that in fact there has been no negligence. Of course, where a dangerous operation is carried on, the duty of care is high and it may even be that the onus of proof will shift to the defender to show that no negligence occurred. Yet, unless absence of negligence is irrelevant or negligence is imputed by law, it is impossible that the defender should be deprived of the opportunity to escape liability by proving that he exercised all the care that is expected of a reasonable man in the particular circumstances. This is precisely what the rule in *Kerr v Earl of Orkney* declares he cannot excuse himself by doing.<sup>252</sup>

The availability of diligence as a defence is unclear. But, as argued above, the authority seems to point towards it not being admissible.<sup>253</sup> If this is the case, the presumption would be irrebuttable, undermining in a conclusive way the orthodox account of the rule based upon negligence elements.

### 3.2.4. The possibility opened by *Kennedy*: Recklessness?

*Kennedy*, however, opened up a new possible fault-based account that is not based upon negligence. Lord Hope, when referring to conduct causing a special risk of abnormal damage, considered that it was “perhaps just another example of recklessness”. A reckless defender was described as one that has “no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result”.<sup>254</sup>

It has been argued in chapter 2, however, that the element of disregard of or indifference to risk has disappeared in the evolution of recklessness after *Kennedy*. Recklessness has been reduced to a state of pure – actual or constructive – knowledge of likelihood of harm. In this context, and insofar as conduct causing a special risk of abnormal damage requires knowledge of the danger, it can certainly be characterised as an example of recklessness. But, as concluded in chapter 2, this entails in practice a form of liability that is indistinguishable from strict liability.<sup>255</sup>

Now, even if we consider the “pre-*Kennedy*” notion of recklessness, namely the notion that is still essentially defined by indifference, the conclusion does not change substantially. There is nothing in the configuration of conduct causing a special risk

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<sup>252</sup> Middleton (n 211) at 76.

<sup>253</sup> See p 148 above.

<sup>254</sup> *Kennedy* (n 1) at 100.

<sup>255</sup> See chapter 2 section 6.

of abnormal damage that indicates indifference to risk on the part of the person engaging in the conduct. If such indifference is inferred from the fact that the person decided to engage in the conduct despite the risks that are involved, then this is a *presumption*, not an *example*, of recklessness. Depending on whether the defender is allowed to demonstrate the absence of recklessness, i.e. whether the presumption is rebuttable, this can be seen as in effect a strict liability rule.<sup>256</sup>

We are, therefore, back at square one: to leave the realm of strict liability, we take the recklessness route, but this route seems to lead us straight back to strict liability.

### 3.2.5. The last option: fault by endangering?

There is, however, a different way in which this rule could be explained on the basis of fault: by considering that there is fault in the sole creation of a foreseeable risk like the one discussed in this chapter, regardless of the precautions taken. This is the explanation offered by Middleton for the outcome of *Kerr*:

He was made responsible, not merely because his dam gave way, but because he had *chosen* to create a risk of harm to other people. He could said to be blameworthy in so far as he deliberately did something which he either foresaw, or ought to have foreseen, *might* be dangerous. Otherwise there could be no blame, since nobody can guard against something that he cannot foresee. But while there was fault, there could not be said to be negligence [...]. It is necessary to recognise the existence of a variety of *culpa* which consists in creating a hazard, or initiating an activity which is potentially harmful to others. Absence of negligence is not a defence in this case, for *culpa* is involved in deciding to start the potentially harmful activity, not merely in failing to exercise due care once the decision to start it has been made.<sup>257</sup>

This view returns us to what seemed to have been Whitty's first approach: considering the creation of a special risk of abnormal damage a separate category of fault, alongside malice, intention, recklessness and negligence. This would also explain why the absence of negligence or intention is not a defence, and the view seems to be consistent with the language in *Chalmers*, *Noble's Trs* and *Anderson*, which

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<sup>256</sup> See p 26 above.

<sup>257</sup> Middleton (n 211) at 77. See, in a similar sense, W A Elliot, "What is Culpa?" (1954) 66 JR 6 at 23-26.

all highlight the idea of *culpa* lying in the act of engaging in the dangerous activity itself.

There is, however, wide agreement on the opposite conclusion. Engaging in dangerous activities does not entail fault. “To say that someone was at fault in behaving as they did is to say that they should have behaved differently”.<sup>258</sup> But this is not the case here: the law does not forbid these activities nor can they be enjoined, because their value justifies taking the risk.<sup>259</sup> The law’s reaction is simply to impose a condition in order to allow people to engage in these activities: they must compensate the victims if risk materialises;<sup>260</sup> “society’s consent” depends on such condition.<sup>261</sup>

The last explanation, therefore, does not provide a satisfactory fault-based account of the rule.

### 3.3. Conclusion

The analysis and evaluation developed in this section shows that the rule under discussion is, indeed, one of strict liability. The elements and effects of this regime are coincident with those that have been signalled as key for the definition of a strict liability rule, and all the different fault-based accounts of the rule suffer from grave shortcomings, turning them into fairly unconvincing explanations.

The acknowledgement of the strict liability nature of the rule, consequently, underscores the relevance of defining adequately the category to which it applies.

## 4. DEFINING THE CATEGORY: A PROPOSAL

Most of the literature concerning the regime under discussion here has concentrated upon the rule’s nature, and more precisely, in explaining it in fault terms. As a consequence, the definition of the scope of the category to which the regime applies

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<sup>258</sup> Cane, *Atiyah’s Accidents* (n 235) 44.

<sup>259</sup> See e.g. J G Fleming, *An Introduction to the Law of Torts* (2nd edn, 1985) 154-155; T Honoré, *Responsibility and Fault* (1999) 23 and 28.

<sup>260</sup> Fleming (n 259) 155. This is what very recently Goldberg and Zipursky have called “conditional permissibility”: J C P Goldberg and B C Zipursky, “The Strict Liability in Fault and the Fault in Strict Liability” 85 *Fordham LR* 743 at 763.

<sup>261</sup> Honoré (n 259) 23.

does not appear as a fundamental concern. Yet this definition is crucial for a liability regime that is exceptional in a system committed to the fault principle.

The present section therefore proposes a framework of the relevant elements that should be taken into account in defining “conduct causing a special risk of abnormal damage”, making choices based upon the available authority and general legal principles of liability. It will argue that the strict liability rule should be applied to abnormally dangerous conduct (section 4.1), defined as that which creates a high risk of grave physical damage (section 4.2), and restricted to those cases where risk cannot be adequately controlled by reasonable care and is not of common usage (section 4.3), and where risk and its magnitude are known or at least reasonably expected to be known by the defender (section 4.4).

The proposal takes its inspiration from the models adopted by the American Rest (3d) and the PETL for abnormally dangerous activities, but with significant differences and qualifications. The Rest (3d) is a helpful working model because its formulation was based on the judicial experience of applying the previous versions, in particular the Rest (2d) formulation which was so influential for Whitty, taking into account the elements that were problematic in practice. The PETL, in turn, provide a useful framework because they try to “encompass the lowest common denominator as a minimum standard” between the different jurisdictions considered.<sup>262</sup>

#### 4.1. Terminology: from “conduct causing a special risk of abnormal damage” to the simpler “abnormally dangerous conduct”

The first element of this proposal is one of terminology. As explained above,<sup>263</sup> the expression coined by Lord Hope in *Kennedy* to describe the conduct to which this special liability regime applies seems to be the result of an evolution in which the changes suffered by the formulation are neither explained nor explicitly justified. From a “special use bringing with it increased danger to others”, qualification

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<sup>262</sup> European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (2005) 104.

<sup>263</sup> See pp 105 and 125 above.

introduced by *Rickards v Lothian*<sup>264</sup> to the *Rylands* rule, which found its way into Scots law through the case of *Miller v Robert Addie*;<sup>265</sup> it evolved into Whitty’s “conduct causing a special risk of abnormal danger” as a form of fault;<sup>266</sup> later finding itself in Lord Hope’s dictum as “conduct causing a special risk of abnormal damage”. We can only speculate as to the reasoning underlying these changes, and we can even evaluate these changes as positive, but the expression remains a source of uncertainties. It is unclear (i) what makes a risk “special” – whether it is only defined by a high likelihood of harm or it incorporates other elements such as the nature of the source of the risk, i.e. an “uncommon” activity; (ii) what makes damage “abnormal” – whether it is only its magnitude or also its nature; and (iii) to what extent these two elements can interact – whether a particularly “high” presence of one can lower the requirement of the other one, or is there a minimum threshold for one of them.

The expression “abnormally dangerous conduct” seems preferable since it imposes a single requirement of abnormality and, in defining danger, allows for a margin of interaction between likelihood and magnitude of harm. Certainly the expression itself does not necessarily convey much more meaning in terms of how we define abnormality, that is, it does not solve conclusively uncertainties (i) and (ii) listed above. This is, of course, an objection that can be made to any general standard that is embodied in one term. But by deploying one single notion and one single requirement, the formulation proposed here does not preclude the interaction of elements as explained in (iii), allowing a more flexible approach, and eliminates possible redundancies in the notion. Uncertainties (i) and (ii) are, in turn, clarified by the other elements of the proposal explained below.

This terminological element highlights two further substantive points regarding the determination of the category: first, it focuses on dangerous *conduct*, and not on dangerous *things*; and secondly, as a consequence, it is a broader notion than that of *escapes* of things, which defines the current understanding of the *Rylands* rule’s scope of

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<sup>264</sup> *Rickards* (n 9) at 280.

<sup>265</sup> *Miller v Robert Addie* (n 8) at 154 per Lord Justice-Clerk Aitchison; 165 per Lord Hunter; and 158 per Lord Anderson.

<sup>266</sup> Whitty, “Nuisance” § 2087.



application in England.<sup>267</sup> It is true that the authority upon which the category is based consists mainly of cases that could be characterised as escapes, yet it is difficult to see why a conduct that creates a similarly relevant level of danger should be treated differently simply because it does not entail the movement of a substance from one land to another. This point was clearly made in the *Thirteenth Report*,<sup>268</sup> and was also recognised as a source of potential anomalies by the English Law Commission.<sup>269</sup> Furthermore, *Kennedy* itself departed from these notions by describing the category in terms of risk-creating conduct.

Furthermore, the notion of “conduct” is preferred here over the term “activity”, adopted both by § 20 Rest (3d) and article 5:101 PETL, because the latter might be seen as requiring active conduct, excluding, for example, omissions such as in *Anderson v White*, where the rule was considered as applicable: the second defenders failed to prevent the level of water being raised to a dangerous point.<sup>270</sup> Of course this particular omission could be seen as part of a positive activity: controlling a dam. But this is problematic, for a broad definition of an activity tends to “dilute” risk, that is, the overall activity might be seen as less dangerous than a particular conduct carried out in its context, restricting enormously the application of the rule.<sup>271</sup>

Consequently, the terminology proposed here is clearer than that currently available and, at the same time, reflects judicial trends.

#### 4.2. The basic elements of abnormal danger and their interaction: high risk of grave physical damage

Most human behaviour creates danger. “Dangerousness can thus hardly serve as the exclusive justification for deviations from general rules of tort law. [...] We therefore

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<sup>267</sup> See *Read v J Lyons & Co Ltd* (n 71); and *Cambridge Water Co* (n 177) at 305 per Lord Goff.

<sup>268</sup> Law Reform Committee for Scotland (n 81) § 21.

<sup>269</sup> Law Commission, *Civil Liability for Dangerous Things and Activities* (Law Com No 32, 1970) appendix I, § 7, acknowledged subsequently by the Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (Cmnd 7054, 1978) § 1637.

<sup>270</sup> See p 140 above.

<sup>271</sup> The point is made by G W Boston, “Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier” (1999) 36 San Diego LR 597 at 649.

need to find some way to measure the degree of danger”.<sup>272</sup> It is proposed here that, as a starting point, an abnormally dangerous conduct is one that creates a *high risk of grave physical damage*.

#### 4.2.1. High risk

Risk is composed of two elements: the magnitude of the potential harm and the likelihood of its materialisation. Therefore, the risk of a particular harm can be high because the likelihood of its occurrence is very high, even though its magnitude is not particularly material, or vice versa. This is the approach adopted both by § 20 Rest (3d)<sup>273</sup> and article 5:101(3) PETL. The formulation proposed here, however, sets a minimum threshold of gravity of harm for the activity to be characterised as abnormally dangerous: danger will be abnormal only when the potential harm is grave. In any case, there can be different levels of gravity over this threshold, and within this margin there is space for interaction between magnitude and likelihood. If the potential harm is devastating (e.g. death, total collapse of buildings), a lower likelihood of its materialisation can justify the characterisation of the conduct as abnormally dangerous, whereas in the case of potential harms of less significance, but still grave (such as, for instance, severe but non-fatal bodily injury or structural damage of buildings), a higher likelihood should be required to justify such characterisation.

#### 4.2.2. Grave physical damage

*Physical* damage encompasses both bodily injury and damage to property. Scots case law has not discriminated between these two types of damage when deciding the scope of application of the special liability regime. It is true that in most of the cases considered in section 2 where the harm suffered by the victim was death or personal injury, the rule was not applied. This result, however, had nothing to do with the

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<sup>272</sup> B A Koch and H Koziol (eds), *Unification of Tort Law: Strict Liability*, vol 6 (2002) at § 52.

<sup>273</sup> See comment g.

type of injury suffered: the rule was excluded because the activity developed by the defender was one of common usage. In turn, the limitation that south of the border has been imposed on the *Rylands* rule, in that its application is restricted only to property damage,<sup>274</sup> is tightly linked with its current understanding as a property protection rule.<sup>275</sup>

This proposal, in contrast, includes both types of harm. It is only logical that a regime that seeks to impose liability for abnormal danger should encompass the gravest possible consequences that a person can suffer, i.e. death or severe personal injury.<sup>276</sup>

The harm, however, must be physical. The starting point in the common law is that there is no generally recognised right to economic or mental integrity, even if harm is inflicted with fault.<sup>277</sup> Therefore, for pure economic loss or pure mental harm to be actionable the law imposes one or more additional requirements: gravity thresholds, specific proximity tests, and/or particular forms of fault. When economic or mental harm are, on the contrary, the consequence of the infringement of a recognised right, such as property or physical integrity, they are compensated by operation of the principle of full compensation.<sup>278</sup> Whether the common law's approach is justified is a question that goes beyond the scope of this thesis; the proposal here advanced simply seeks to be coherent from a systemic viewpoint. Hence, the regime under discussion disposes of the requirement of fault, under certain circumstances, for the infringement of a recognised right, where fault would have indeed been a sufficient basis of liability. But when that would have not been the case, this regime does not provide a way of circumventing the additional requirements imposed by the law. Consequently, pure economic loss and pure mental or emotional harm should be actionable only under the general rules of fault-based liability insofar as they meet these specific requirements.

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<sup>274</sup> "It is now clear beyond even undergraduate fantasies that it cannot be prayed in aid by the victim of personal injury, even of suffered by a neighbour on his own land": T Weir, *An Introduction to Tort Law* (2nd edn, 2006) 92.

<sup>275</sup> See *Transco Plc v Stockport Metropolitan Borough Council* (177) at §§ 35 and 46 per Lord Hoffman.

<sup>276</sup> The exclusion of personal injury would "seem strange": Walker, *Delict* 987.

<sup>277</sup> R Stevens, *Torts and Rights* (2007) 21 and 52.

<sup>278</sup> See Cane, *Anatomy* (n 228) 107-110.

In order to meet the minimum threshold, however, it is obviously not enough that damage is physical. Physical harm can, in fact, be negligible. Harm must also be *grave*, that is, of a considerable magnitude. Examples of grave physical damage to the person include death and serious impairment or illness. Examples of grave physical damage to property include collapse of buildings, severe structural damage, and destruction of moveable property such as crops, vehicles or furnishings. The purpose of setting this minimum threshold is to exclude from the special regime of liability injuries that are certain or almost certain to be suffered but are of more limited magnitude, avoiding, in this way, the “blending of two extremes” that are socially not comparable.<sup>279</sup> Consequently, trivial or less significant harms, even if highly likely – or almost certain – to materialise do not justify the characterisation of the conduct as abnormally dangerous. It has been highlighted above<sup>280</sup> that discussion of the magnitude of the harm was virtually absent from Scots case law and that this could create a problem of over-inclusiveness, even though the label of the category seemingly stresses “abnormality” of damage. Setting a minimum threshold of damage, therefore, seeks to prevent this problem and aligns with doctrinal views of the category as focused chiefly on the gravity of the possible harm.<sup>281</sup>

#### 4.2.3. Abnormal sensitivity

A further problem arises in determining whether potential harm is grave enough to justify the characterisation of the conduct as abnormally dangerous: the incidence of abnormally sensitive persons or abnormally sensitive property. Seemingly the question here is whether we should extend the “egg-shell skull rule”, accepted in negligence cases,<sup>282</sup> to this special liability regime, i.e. whether the defender is liable for injury the magnitude of which is augmented by some pre-existing condition that makes the victim or his property abnormally sensitive. And, again seemingly, there

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<sup>279</sup> E Büyüksagis and W H van Boom, “Strict Liability in Contemporary European Codification: Torn between Objects, Activities, and their Risks” (2013) 44 *Georgetown J of Intl L* 609 at 632.

<sup>280</sup> See p 134 above.

<sup>281</sup> See p 144 above.

<sup>282</sup> See chapter 2, section 5.2.4.

could be a case for distinguishing between abnormally sensitive persons and abnormally sensitive property, extending liability only in the first case.<sup>283</sup>

On a closer analysis, however, it is possible to note that the question is a different one. The egg-shell skull rule, understood as described above, is a matter of extent of compensation. It tells us what the defender is liable for, i.e. which injuries he will be bound to repair. But a different problem arises when we incorporate a certain magnitude threshold in the liability rule, because in this case the question is not about the extent of the defender's liability but actually whether he is liable at all. This is what happens, for instance, in nuisance: the *plus quam tolerabile* threshold is incorporated in the liability rule, so liability depends on a certain gravity of the interference, and the law generally disregards abnormal sensitivity in determining such gravity, favouring a standard set by reference to persons or property of normal sensitivity.<sup>284</sup> In the special liability regime proposed here, the magnitude of the potential harm would not exactly determine whether there is liability, but rather according to which rule of liability the defender will be assessed, so that if the potential harm is not grave enough, general fault-based liability rules – of nuisance or negligence – must be applied.

The question in this context is, therefore, whether a conduct can be regarded as abnormally dangerous when the potential harm would not have been grave had the victim or his property been of normal sensitivity, but it turns out to meet the minimum gravity threshold precisely because the sensitivity is abnormal.

The Rest (3d) does not deal with this question; it only deals with the egg-shell skull rule.<sup>285</sup> But the Rest (2d) did address the issue, excluding the application of the strict liability rule “if the harm would not have resulted but for the abnormal sensitive character of the plaintiff's activity”.<sup>286</sup> It can be noted that the exclusion is framed in very restrictive terms: the liability rule does not apply only if harm *would not have resulted*, seemingly allowing the application of the rule when harm would have still resulted, *but not met the gravity threshold* but for the abnormal sensitivity. Moreover, the

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> § 31.

<sup>286</sup> § 524A.

rule is excluded only due to the abnormal sensitivity of the plaintiff's *activity*, which could ordinarily be seen as encompassing his property, but probably not his person.

It is not possible to find a straightforward answer to this question in the Scottish authority considered so far, but the case for disregarding abnormal sensitivity of property in the application of the *Rylands* rule was made in a South African case decided by the Privy Council: *Eastern and South African Telegraph Co v Cape Town Tramways Co*. In this case, electricity from the tramlines operated by the defenders escaped and interfered with the telegraphic communications system operated by the pursuer. Lord Robertson submitted that

A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands v Fletcher*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property.<sup>287</sup>

This argument was put forward by the defenders in the *Western Silver Fox Ranch* case. They submitted that the silver fox breeding business run by the pursuers was a “special use” in the sense the expression was used by Lord Robertson. Although the Lord Ordinary's response to the argument is initially rather puzzling, for it sought to solve the issue applying the non-natural use test to the pursuer's activity<sup>288</sup> – possibly in light of Lord Robertson's words, it provides some light on the matter. After acknowledging some level of special sensitivity on the part of the foxes, he added that

This, however, does not alter the quality of the risk to which he who blasts subjects his neighbour, but only the quantity of the damage the neighbour may suffer. Thus, upon the uncontradicted evidence [...], some of the sows in a pig-breeding farm would have been affected by the blasting in this case, just as the silver fox vixens were, and with similar results.<sup>289</sup>

The implication seems to be, therefore, that if harm would be equally suffered by normally sensitive property, the fact that the property in the case was abnormally sensitive does not exclude the application of the rule. But if the gravity threshold is

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<sup>287</sup> *Eastern and South African Telegraph Co v Cape Town Tramways Co* [1902] AC 381 at 393.

<sup>288</sup> Walker, *Delict* 989 notes the “confusion”.

<sup>289</sup> *Western Silver Fox Ranch* (n 68) at 606.

met only due to hypersensitivity, then the application of the rule should be excluded and general nuisance or negligence rules apply.

There could be a case for restricting this reasoning only to property: in the case of hypersensitive property there seems to be an element of choice on the part of the pursuer that is absent in the case of hypersensitive persons. The pursuer chooses to engage in telegraphic communications or to breed silver foxes, like in the cases commented above, but he does not choose to suffer a condition that makes him hypersensitive. But the reason why hypersensitivity is disregarded when assessing gravity of harm is not because the pursuer should suffer the consequences of his choice. The reason is that the defender cannot be expected to foresee such a result and, as will be argued below, the rule should only be applicable when the defender knows or is reasonably expected to know of the level of danger that he is creating.<sup>290</sup> This reasoning applies equally to hypersensitive persons and hypersensitive property.

This answer does not prevent the application of the actual egg-shell skull rule when the regime under analysis is applicable, i.e. the compensation of injuries in their actual extent even when their gravity is higher due to abnormal sensitivity, provided that a person or property of normal sensitivity would have suffered injury that is grave enough to meet the minimum threshold.<sup>291</sup>

#### 4.2.4. Victim's contribution to risk

A similar problem in the determination of the risk's magnitude is encountered when the conduct of the victim is a decisive factor in raising the risk to a level that justifies the characterisation of the conduct as abnormally dangerous, that is, when the level of risk – either due to its likelihood or the gravity of the harm – would have fallen below the standard required to make application of the strict liability rule but for the fact that the victim contributed with his conduct to the increase of such risk, by failing to take reasonable care for his own safety or the safety of his property.

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<sup>290</sup> See section 4.4.

<sup>291</sup> Walker, *Delict* 989.

The problem is solved in the Rest (3d) through the rule's description of the risk as that which is highly significant "even when reasonable care is exercised *by all actors*",<sup>292</sup> including the victim.<sup>293</sup> The justification offered is that "[w]hen the conduct of actors other than the defendant has a significant influence on the number of injuries, the defendant cannot fairly be identified as the exclusive cause of the risk".<sup>294</sup> This proposal includes explicitly other agents' contribution to the risk in the rule. § 20 simply states that the relevant level of risk is that which is created by the activity, implying the exclusion of risk contributions from other agents in the determination of such level, and that remains over the required level even when reasonable precautions are taken, without specifying the actors that are expected to take such precautions. Consequently, if what brings the level of risk over the standard is the victim's failure to take reasonable care of his own safety or his property's, then not only is the relevantly high level of risk not exclusively created by the defender, but also it would not meet the required level if reasonable precautions had been taken by the victim.

This does not mean that the defence of contributory negligence is excluded as a way of seeking apportionment of liability. According to s 1(1) of the Law Reform (Contributory Negligence) Act 1945,

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage[.]

The interpretation given to the term "fault" for the purposes of the application of the Act to Scotland is provided by s 5: "the expression 'fault' means wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages...". Consequently, the term "fault" is not taken in the Act in the sense adopted in chapter 1.<sup>295</sup> It is here certainly a broader notion. The question that

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<sup>292</sup> Rest (3d) § 20(b)(1), emphasis added.

<sup>293</sup> Rest (3d) § 20 comment h.

<sup>294</sup> Rest (3d) § 20 comment h.

<sup>295</sup> See chapter 1 section 2.



arises, therefore, is whether conduct that attracts strict liability can be considered as falling within this broader notion. And the answer seems to be affirmative.

On the one hand, the defence is available in Scotland for liability regimes that are clearly identified as strict. For instance, contributory negligence is admitted in a related strict liability regime: the one for harms caused by dangerous animals. According to s 1(6) of the Animals (Scotland) Act 1987, “[f]or the purposes of the Law Reform (Contributory Negligence) Act 1945, any injury or damage for which a person is liable under this section shall be treated as due to his fault as defined in that Act”. In a similar tone, s 6(4) of the Consumer Protection Act 1987 provides that

Where any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage, the Law Reform (Contributory Negligence) Act 1945 [...] shall have effect as if the defect were the fault of every person liable by virtue of this Part for the damage caused by the defect.

In the same line, in the Scottish Law Commission’s *Report on Civil Liability – Contribution*, the availability of the plea of contribution was accepted in the case of interference with the course of a stream, considered by the Commission as a conduct attracting strict liability.<sup>296</sup>

On the other hand, however, it is arguable that conceptually, despite the label, the availability of the defence entails introducing a fault element that moderates the strictness of the rule.<sup>297</sup> In Cane’s words, “[a]s a matter of principle, it may be argued that if fault is irrelevant to the issue of whether [the defendant’s] conduct attracts liability, it should also be irrelevant to the issue of whether [the plaintiff’s] conduct gives rise to a defence”.<sup>298</sup> Yet it appears that the admission of the defence does not change the basis of the defender’s liability but only takes into account the causal relevance of the pursuer’s conduct for the severity of the harm suffered, which is consistent with a rule that grounds liability in causation. Further, it seems fair to

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<sup>296</sup> Scottish Law Commission, *Report on Civil Liability – Contribution* (Scot Law Com No 115, 1988) § 4.9.

<sup>297</sup> See V V Palmer, “A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law” (1988) 62 TulLR 1303 at 1330.

<sup>298</sup> Cane, *Anatomy* (n 228) 59.

“require victims to take reasonable care for their own safety”.<sup>299</sup> Consequently, the defence is not incompatible with a strict liability regime.

In sum, if the victim’s contribution is the decisive factor that brings the level over the risk threshold, then the conduct is not itself abnormally dangerous and the special liability regime is not open for the victim. He can pursue liability according to the general rules and his contributory negligence will likely trigger the application of the apportionment rule. If the risk would be relevantly high regardless of the victim’s contribution, then the conduct is abnormally dangerous and the special liability regime applies, but the apportionment rule is not excluded and compensation may be reduced to reflect such contribution.

#### 4.3. Controllability of risk, common usage and social utility

There are three further elements that can be determinative of the type of conduct characterised as abnormally dangerous. These elements are the possibility of controlling the risk created by the conduct through certain precautions, the characterisation of the conduct as one of common usage, and the conduct’s social utility. In contrast with the elements discussed in the previous section, where Scottish authority was virtually non-existent, is possible to find some support in the available authority for the elements considered here.

##### 4.3.1. Possibility of controlling risk

It is proposed here that the risk that makes a conduct abnormally dangerous is that which remains relevantly high *even when reasonable precautions are taken*. In other words, it is a risk that remains at a high level even if the defender’s conduct is diligent (as opposed to negligent). This element marks the point where negligence ends and, therefore, the defender would not be liable unless a different type of fault is present (i.e. intention) or a special liability regime is available.

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<sup>299</sup> Ibid 59-60.

This proposal seeks to make a special liability regime available: it takes the standard of care the breach of which would serve as the basis of a finding of negligence, and utilises this standard as a control device for the definition of the relevant risk, making applicable the special liability regime only where complying with the standard is irrelevant in controlling such risk and bringing it to a “normal” level.

This does not mean that a negligent execution prevents the conduct from being characterised as abnormally dangerous; on the contrary, it can be so described when the level of risk would have remained relevantly high *even if* execution had been diligent, regardless of whether it was, in fact, executed in such way. If this is the case, the pursuer has a choice: either to pursue liability based on the general rules (i.e. negligence, or nuisance if applicable), or to pursue liability under the special regime based on the abnormally dangerous character of the conduct. More precisely, the victim can choose either to aver that the standard of care was breached or to aver that the standard of care would not be effective in controlling the risk.

As for the defender, the rule allows him to make a decision, provided he wishes to engage in the conduct despite the high risk involved: he can either assume the costs of taking additional precautions that would in fact control the risk, or assume the costs of potential liability claims if the risk materialises. In other words, it “induces an actor either to set aside money for victims or, if it is cheaper, to make better choices when engaging in the activity”.<sup>300</sup>

The determination as to which precautions are reasonable is to be made in the same way as in negligence: the standard of care will take into account not only the likelihood of the harm and its gravity, but also the costs of taking precautions, among other considerations.<sup>301</sup> This is, indeed, the reason why, even though the standard of care is determined by reference to the elements of risk, it does not necessarily control the risk effectively: there might be other considerations that make effective precautions unreasonable.

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<sup>300</sup> P M Gerhart, *Tort Law and Social Morality* (2010) 150.

<sup>301</sup> See p 17 above.

The fact that risk cannot be effectively controlled by reasonable precautions has been singled out by the Rest (3d) as the key element considered by courts in characterising activities as abnormally dangerous.<sup>302</sup> It is useful to remember here that the Rest (2d) differed in the way it determined what constituted an abnormally dangerous activity:<sup>303</sup> § 520 contained a list of factors of which none was necessary nor necessarily sufficient of itself. The Rest (3d) surveys the application of § 520 by courts, concluding that the reasonable care factor was the most relevant and, consequently, incorporates it as a necessary factor in the rule set out in § 20.

The same approach is adopted by article 5:101(2) PETL, according to which

An activity is abnormally dangerous if

- a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
- b) it is not a matter of common usage.

It is possible, moreover, to find support in Scots authority for making this element a defining factor of the category: as discussed,<sup>304</sup> the two relevant cases cited by Lord Hope in *Kennedy*<sup>305</sup> to support the implication of fault in the category of “conduct causing a special risk of abnormal damage”, *Chalmers*<sup>306</sup> and *Noble’s Trs*,<sup>307</sup> attempt a distinction between cases where danger can and cannot be controlled through precautions, and clearly identify implied fault in the latter case. Certainly it is not as clear whether they extended the implication of fault to the former and, further, they are not consistent, internally and between each other, in drawing the line that separates the two types of cases. This proposal, consequently, seeks to solve the two problems by, first, limiting the special treatment only to the second type of case (where danger cannot be controlled), and draws the line where reasonable precautions are ineffective in bringing the level of danger down to an acceptable level.

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<sup>302</sup> Rest (3d) § 20, reporter’s note to comment h.

<sup>303</sup> See p 102 above.

<sup>304</sup> See p 128 above.

<sup>305</sup> *Kennedy* (n 1) at 99-100.

<sup>306</sup> *Chalmers* (n 20).

<sup>307</sup> *Noble’s Trs* (n 127).

This is consistent with the cases in which the rule is unequivocally said to be applicable: they were cases where the first type of danger was present. In the case of *Western Silver Fox Ranch v Ross and Cromarty CC*, in defending the application of the *Rylands* rule – identified with the rule in *Kerr and Chalmers* – to the facts of the case, the court remarked that “however carefully high explosives are used, their effect can only be localised to a very limited extent”.<sup>308</sup> In the case of *D McIntyre & Son Ltd v Soutar*, where harm was caused by weed-spraying operations, the Sheriff seemingly extended the rule to both types of dangers, when he stated that “[i]t makes no difference to say that the substance is safe if handled properly; this is a tautology, even radioactive substances, even a nuclear bomb, are safe if handled properly. *The point is that it is dangerous if it escapes*”.<sup>309</sup> The implication seems to be that the possibility of controlling the risk by due care is irrelevant to determine the scope of application of the rule, yet the emphasised phrase acknowledges that, in the case, risk could *not* be controlled: even if the likelihood of escape is low, the potential harm is so grave that it justifies the application of the rule. The examples given are illustrative of this conclusion: these are paradigmatic cases of activities where the risk remains very high even when due care is taken. Furthermore, he continues by saying that the substance’s “dangerous character is enhanced because it is liable to escape by drift and because it is volatile”,<sup>310</sup> effectively denying the unlikelihood of the escape. Other examples can be found in *Gemmell’s Trs v Alexander Cross & Sons Ltd* (manufacture of sulphuric and other acids in premises located on sloping ground),<sup>311</sup> and *Blair v Springfield Stores Ltd* (storage of weevilled grain).<sup>312</sup>

The adoption of this limit is, however, not free from problems. It imposes a high burden on the victim: he needs to aver both the standard of reasonable care *and* that it would not control the risk. It has even been said that this requirement means that the pursuer has effectively to prove that he cannot prove negligence.<sup>313</sup> The criticism, however, ignores the fact that, while imposing a high burden on the victim,

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<sup>308</sup> *Western Silver Fox Ranch* (n 68) at 605.

<sup>309</sup> *D McIntyre & Son Ltd v Soutar* (n 41) at 177, emphasis added.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Gemmell’s Trustees v Alexander Cross & Sons Ltd* (1906) 14 SLT 576.

<sup>312</sup> *Blair v Springfield Stores Ltd* (n 218).

<sup>313</sup> *Boston* (n 271) at 631-639.

the rule opens up a possibility of compensation where the rules of negligence would offer none: the victim can recover damages even if reasonable care *has* been taken. If it has not, then it is for the victim to assess the best strategy, according to the information available.

This limit can be seen also as problematic for the defender, forcing him to shoot his own foot: he cannot challenge the applicability of the rule because it would require him to acknowledge that risk was controllable through due care. One of the Scottish cases that discussed the rule noticed the paradox:

[O]nce [the defender] argues that [the substance] will not cause harm if handled with reasonable care and it is proved that in fact it has caused harm here, it follows, I think, that they must concede lack of reasonable care.<sup>314</sup>

In other words, in order to challenge effectively the application of the rule, the defender will not only have to aver that the risk was controllable by due care, but also that he employed such care, and that harm happened because due care still left a margin of risk not big enough to be abnormally dangerous, which in fact materialised. The strategy is complex and perhaps too risky. But this does not mean that the defender is out of defences: he can always challenge the application of the rule through the other elements, i.e. questioning the level of risk that the conduct creates, or relying on its “common usage” nature if that is the case, as will be discussed below.

In sum, the limit is effective in restricting the strict liability rule to cases where diligence is incapable of controlling the risk and, though burdensome on the parties, it seems to be equally demanding on both of them. For the rest of the cases, the normal rules of negligence apply, where substantive and evidentiary elements will aid the victim who has been exposed to a high risk.

#### 4.3.2. Common usage and social value

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<sup>314</sup> *D McIntyre & Son Ltd v Soutar* (n 41) at 118.

The second element that is relevant in determining the abnormal character of a danger is the nature of the conduct which causes it, particularly whether it is one of common usage and whether it is one of a high social utility. These elements are not uncontroversial.

The element of common usage is key in the Rest (3d) definition of an abnormally dangerous activity (§ 20 (b)(2)): if an activity can be qualified as of common usage, it excludes the application of the strict liability rule.<sup>315</sup> The notion of common usage is seen as the heir of the “natural use” notion from *Rylands*.<sup>316</sup> The same approach is adopted by article 5:101(2)(b) PETL.<sup>317</sup>

This exclusion is generally justified by the reciprocity of risk.<sup>318</sup>

[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant – in short, for injuries resulting from nonreciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim’s risk-creating activity.<sup>319</sup>

As a consequence, strict liability would only be justified when the risk imposed on the victims can be characterised as non-reciprocal. The notion, however, has been criticised, not only because of the difficulty of distinguishing between reciprocal and non-reciprocal risks,<sup>320</sup> but because it excludes activities the benefits of which are widely spread.<sup>321</sup> In this sense, perhaps a better justification for the common usage exclusion lies not on the distribution of risks but on the distribution of benefits, i.e. whether the benefit derived from the conduct is shared by the whole community or, at least, the class of potential victims.<sup>322</sup> Consequently, a strict liability rule would only be justified for conducts that impose widespread risks rendering benefits that are

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<sup>315</sup> In contrast with its role in the Rest (2d), where it was only one of the many elements that could be taken into account: § 520.

<sup>316</sup> Rest (3d) § 20 comment j.

<sup>317</sup> See the text at p 171 above.

<sup>318</sup> See Rest (3d) § 20 comment j and reporters’ note to comment j.

<sup>319</sup> G P Fletcher, “Fairness and Utility in Tort Theory” (1972) 85 HarvLR 537 at 542. See also J L Coleman, “Moral Theories of Torts: their Scope and Limits: Part I” in M D Bayles and B Chapman (eds), *Justice, Rights and Tort Law* (1983) at 60-61; and more recently K W Simons, “The Restatement Third of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines” (2009) 44 Wake Forest LR 1355 at 1362.

<sup>320</sup> Gerhart (n 300) 153.

<sup>321</sup> Epstein (n 228) at 349.

<sup>322</sup> Simons (n 319) at 1364.

concentrated only in a few.<sup>323</sup> Thus, it should exclude not only activities widely carried out by a significant part of a community, but also those that despite being carried out by a limited number of people, produce benefits for a significant part of the community – or its entirety. These are not “abnormally” dangerous, in that they are not “outside of the bargain of those risks which must be accepted as part of group living in our society”.<sup>324</sup>

Scottish authority points almost unequivocally to the restriction of the rule only to cases where the danger is not “common”, taking as a starting point the *Rickards* qualification to the *Rylands* rule.<sup>325</sup> The restriction takes both forms enunciated above: it excludes activities that are ordinary and pervasive, like in the cases of *Miller*,<sup>326</sup> *Spiers v Newton-on-Ayr Gas Co*,<sup>327</sup> and *M’Laughlan v Craig*,<sup>328</sup> or it excludes activities that render benefits that are widely distributed, like in *Clarke v Glasgow Water Commissioners*<sup>329</sup> and in the *Western Silver Fox Ranch* case.<sup>330</sup>

The notion of general or widespread benefits should be distinguished from the element of social value. The fact that a conduct has a high social value does not mean that this value is widely distributed; it does not turn it into a common usage in the sense explained above.

The element of social value, formerly a relevant factor in the context of § 520 of the Rest (2d) was excluded from § 20 of the Rest (3d). And the elimination is justified:

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<sup>323</sup> Büyüksagis and van Boom (n 279) at 1364.

<sup>324</sup> Stevens, *Torts and Rights* (n 277) 113.

<sup>325</sup> See n 28 above.

<sup>326</sup> *Miller v Robert Addie* (n 8) at 154 per Lord Justice-Clerk Aitchison: “the provision of coal gas in an ordinary service pipe [...] is a *familiar everyday use* both in urban and in rural areas” (emphasis added).

<sup>327</sup> *Spiers v Newton-on-Ayr Gas Co* (n 83) at 236: a leak of gas will “involve liability only on proof of negligence [when it consists of an] escape from domestic apparatus installed *for the comfort and convenience of ordinary life*” (emphasis added).

<sup>328</sup> *M’Laughlan v Craig* (n 69) at 611 per Lord President Cooper: “the introduction into dwelling-houses of a domestic gas or electricity supply has not only been the *invariable practice in urban Scotland for generations* but has long been obligatory under aedilic regulations and housing statutes” (emphasis added).

<sup>329</sup> *Clarke v Glasgow Water Commissioners* (n 82) at 15: “The law laid down in *Rylands v Fletcher* [...] relates to private individuals storing water or other dangerous elements on their own land for their own private purposes. [...] But in the case of a public body who carry on a public undertaking *for behoof of the whole community* [...] the same principle does not apply” (emphasis added).

<sup>330</sup> *Western Silver Fox Ranch* (n 68) at 605: “the detonation of a considerable quantity of high explosive is, in a different category altogether from the provision of water or gas in houses *for the benefit of the general community*. The use of high explosives benefits a section only of the community, and not the whole community or substantially the whole community” (emphasis added).



there is an underlying assumption that activities that are subject to the strict liability rule are, indeed, socially desirable.<sup>331</sup> This is, precisely, the reason why these activities are tolerated,<sup>332</sup> even though they create an abnormal danger, instead of being prohibited. But the fact that they create social benefits does not justify the assumption of the costs by random victims.<sup>333</sup> In contrast with the element of common usage, Scots courts have not ruled out the application of the rule purely on the basis of the social utility of a particular conduct.

#### 4.4. The knowledge required on the part of the defender

It is proposed that the risk and its magnitude must have been known or at least reasonably expected to be known by the defender at the time he carries out the conduct that creates it. Therefore, it is not relevant whether he *actually knew*; it suffices that he could have known according to the information available at the time he engaged in the conduct and the research that can reasonably be expected from a person engaging in such conduct. This entails reading *Chalmers v Dixon* with a qualification: even though it is submitted that knowledge of the danger is irrelevant, because he who “brings new materials upon his land is bound to know the nature of these materials”,<sup>334</sup> the irrelevance must be understood as referring to actual knowledge. What he is bound to know must be limited by what he could have known and was expected to know.<sup>335</sup>

The purpose of this requirement is to enable the defender to make a reasoned decision about his engagement in the activity and, at the same time, to avoid paralysis of activities that might be socially useful. The strict liability rule advanced here entails that there is a certain level of risk that the defender is willing to accept and, in economic terms, internalise in this activity. Permitting this assessment to be altered *ex post* by information that was not reasonably discoverable at the relevant

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<sup>331</sup> Boston (n 271) at 624.

<sup>332</sup> F Werro and E Büyüksagis, “The Bounds Between Negligence and Strict Liability” in M Bussani and A J Sebok (eds), *Comparative Tort Law: Global Perspectives* (2015) at 211.

<sup>333</sup> W K Jones, “Strict Liability for Hazardous Enterprise” (1992) 92 ColumLR 1705 at 1712.

<sup>334</sup> *Chalmers* (n 20) at 464 per Lord Justice-Clerk Moncreiff.

<sup>335</sup> See p 133 above.

time could create a level of uncertainty that might jeopardise the development of economic activity, especially when it involves innovation.

This requirement of actual or implied knowledge of the risk and its magnitude supposes that harm is foreseeable. There is no need for a separate requirement of foreseeability of harm.

#### 4.5. Conclusion

Since the regime under discussion in this chapter has been identified as one of strict liability according to the features set out in chapter 1,<sup>336</sup> then the delineation of the scope of application of such regime becomes fundamental. The present section proposed the relevant elements that should determine the boundaries of abnormally dangerous conduct attracting strict liability. The proposal, based upon the currently available authority and general principles of delictual liability can be summarised as follows: strict liability should apply only to conduct that: (i) creates a high risk of grave physical harm which risk remains even if reasonable precautions are adopted; (ii) is not the consequence of a common usage; and (iii) that is known or should be known by the person engaging in such conduct.

### 5. CHAPTER CONCLUSIONS

This chapter has sought to contribute to the discussion of conduct causing a special risk of abnormal damage as a special category of fault in the context of neighbour liability. An analysis of the category's sources and subsequent case law and literature has shown that both the nature and scope of this category are in need for substantive clarification. It was argued here that, contrary to the orthodox view, the liability that this category attracts does not merely operate in practice like strict liability, but is indeed conceptually strict. This conclusion highlights the relevance of outlining more clearly the type of conduct to which this exceptional liability regime applies. Consequently, this chapter argued that this strict liability rule should apply to

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<sup>336</sup> Chapter 1 section 3.2.

abnormally dangerous conduct, setting out and explaining the elements and boundaries of this conduct.

## 4 Disputes over Uses of Water

### 1. INTRODUCTION

Opening his chapter on “Water”, Rankine remarked that “[n]o part of the law of neighbourhood has given so many difficult and delicate questions as the law which relates to right in water”.<sup>1</sup> The volume of litigation on the matter is a good illustration of the statement: a significant proportion of the decided Scots cases between neighbours throughout the nineteenth century involved a dispute about the use of water running through or present in their lands. Use of water was, of course, of critical importance for Scotland’s pre-industrial agricultural economy as well as for the industrialisation process in the second half of the nineteenth century. Litigation rates dropped by the turn of the century, probably due to the incidence of statutory regulation.<sup>2</sup> But over the past three decades, water disputes have regained a prominent position in the neighbourhood context, disputes that are mostly derived from the harmful consequences of larger-scale construction projects, including public works. The types of uses complained of are varied and include activities that contaminate a stream or loch, consumption of water naturally present on the land, alterations of the bed of a river, construction and operation of dams.

Disputes over uses of water, even if only involving private water rights, carry with them a public dimension, of which the most obvious aspects are public health and environmental protection. These concerns were historically addressed in the framework of common law and local regulations.<sup>3</sup> Industrialisation in Britain, however, created unprecedented pollution problems for which common law was insufficient as a control tool.<sup>4</sup> Provisions aimed at controlling water pollution can be

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<sup>1</sup> Rankine, *Land-Ownership* 511.

<sup>2</sup> See p 180 below.

<sup>3</sup> See, e.g. *Magistrates of Inverness v Skinners of Inverness* (1804) Mor 13191, making reference to local council acts. An old (1606) Scottish Parliament statute dealing with the issue is identified by Ferguson as exceptional: J Ferguson, *The Law of Water and Water Rights in Scotland* (1907) 369.

<sup>4</sup> M Lobban, “Tort Law, Regulation and River Pollution: The Rivers Pollution Prevention Act and its Implementation, 1876-1951” in TT Arvind and J Steele (eds), *Tort Law and the Legislature Common Law, Statute and the Dynamics of Legal Change* (2013) at 329.

found in several nineteenth century statutes.<sup>5</sup> The first special act to restrain such pollution was passed in 1876,<sup>6</sup> leading to a succession of statutory regulations directed specifically to this end throughout the twentieth century up to the present day.<sup>7</sup>

Specific uses of water have similarly been regulated by statutes in an attempt to protect diverse interests of public relevance. This is the case for activities such as drainage,<sup>8</sup> management of watercourses and embankments,<sup>9</sup> irrigation,<sup>10</sup> construction and management of reservoirs,<sup>11</sup> and abstraction of water.<sup>12</sup>

This extensive regulation possibly accounts for the decrease in litigation rates over the twentieth century. Nonetheless, common law retains a fundamental role, particularly in deciding reparation claims, for which most statutes do not provide special rules. The basis of liability in these claims, as in other types of disputes between neighbours, has not always been entirely clear. On the one hand, the categorisation of disputes over uses of water has evolved, leading to the current standard position of categorising them as nuisances. On the other hand, the liability rules applicable to the categories within which water disputes have been adjudicated have themselves evolved, shifting from seemingly strict liability to – at least general – fault-based liability rules.

This chapter argues that, currently, damages claims arising from water disputes follow consistently the general frameworks of liability for nuisance and abnormally dangerous conduct outlined in chapters 2 and 3. As a general rule reparation claims depend on the averment and proof of fault (section 2). Yet when a use of water

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<sup>5</sup> Ferguson (n 3) points out statutes regulating fishing, public undertakings, public health and burgh police (370-376), and water supply (394) all containing provisions designed to control and prevent pollution of water.

<sup>6</sup> Rivers Pollution Prevention Act 1876. See J C C Broun, *The Law of Nuisance in Scotland* (1891) 169.

<sup>7</sup> Rivers (Prevention of Pollution) (Scotland) Act 1951; Control of Pollution Act 1974; Environment Act 1995; Water Environment and Water Services (Scotland) Act 2003. See Gordon & Wortley, *Land Law* §§ 6-41 to 6-51 for an overview of the evolution of this statutory regulation.

<sup>8</sup> Drainage of Lands Act 1847; Land Drainage (Scotland) Act 1930; Land Drainage (Scotland) Act 1941; Land Drainage (Scotland) Act 1958; Flood Prevention and Land Drainage (Scotland) Act 1997; Flood Risk Management (Scotland) Act 2009

<sup>9</sup> Flood Prevention (Scotland) Act 1961; Flood Prevention and Land Drainage (Scotland) Act 1997; Flood Risk Management (Scotland) Act 2009.

<sup>10</sup> Spray Irrigation (Scotland) Act 1964; Natural Heritage (Scotland) Act 1991; Water Environment (Consequential and Savings Provisions) (Scotland) Order 2006.

<sup>11</sup> Reservoirs Act 1975; Flood Risk Management (Scotland) Act 2009; Reservoirs (Scotland) Act 2011.

<sup>12</sup> Water (Scotland) Act 1980; Water Resources (Scotland) Act 2013.

creates a risk that reaches the relevant level, liability follows the special regime provided for abnormally dangerous conduct, that is, a strict liability rule. Accordingly, despite the dissenting voices raised recently, the traditional reading of the *Caledonian Railway Co v Greenock Corp*<sup>13</sup> case is correct: it provides for a strict liability rule in the case of an alteration of the natural course of a water stream, though not because it interferes with riparian rights, as traditionally stated, but because it creates the level of risk that justifies the imposition of such rule, and insofar as it creates such level of risk. It follows, therefore, that not only the alteration of a watercourse, but in fact any operation involving water that creates the relevant level of risk, is subject to this rule (section 3).

This chapter is limited to uses of water *naturally* running through or present in the parties' land. Artificial channels, on the one hand, stand in a different position from natural streams, in that the rights of the parties are normally determined by reference to the terms under which they make use of the channel and the water running in it.<sup>14</sup> On the other hand, the artificial introduction of water into land and buildings through, e.g., pipes has generated a significant amount of litigation, yet it does not require the particular accommodation that is needed for uses of water as a natural resource, and indeed is not different from the artificial introduction of other elements, such as gas or electricity.

## 2. THE GENERAL RULE: FAULT-BASED LIABILITY

Damages claims for harm caused by uses of water are mostly of one of two types. In the first type, pursuers seek reparation for the harm sustained as a consequence of pollution of water, i.e. an interference with the "quality" of water. The harm complained of is normally of one of two classes: physical damage to property or economic loss.<sup>15</sup> In the second and certainly the most common type of claim, pursuers seek reparation for the harm caused by an activity or operation carried out

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<sup>13</sup> *Caledonian Railway Co v Greenock Corp* 1917 SC (HL) 56.

<sup>14</sup> See, e.g. *Irving v Leadhills Mining Co* (1856) 18 D 833; *Heggie v Nairns* (1882) 9 R 704; and *Strachan v City of Aberdeen* (1905) 12 SLT 725.

<sup>15</sup> In a limited amount of cases, the defender claimed both types of injury: see e.g. *Collins v Hamilton* (1837) 15 S 895 and *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76.

by the pursuer that alters or interferes with the natural flow of water, either a defined watercourse or surface water. The class of harm in this type of claim is normally physical damage sustained by property as a consequence of the mechanical action of water, though economic loss derived from the permanent diversion of a stream has also been claimed.<sup>16</sup>

In modern Scots law, these disputes have been categorised in three different ways: as belonging to the doctrine of common interest; to the law of nuisance; or to no specific category, especially in a few nineteenth century cases where physical injury was the harm sought to be repaired, and where decisions relied on the more general notion of “wrong”. The particular case of damage caused by operations of drainage of surface water, however, has remained a separate category, except when the complaint is about pollution of such water.

The argument presented here is straightforward: one can question whether the categorisation of certain disputes is correct, and one can even question whether the liability rule associated with each of these categories is adequate, but the inevitable conclusion as to the basis of liability in the current taxonomy is that liability is fault-based. Over the last thirty years, disputes over uses of water have been consistently categorised as nuisances,<sup>17</sup> and during the same period, liability for nuisance has been considered fault-based on the authority of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*<sup>18</sup> and *Kennedy v Glenbelle Ltd*.<sup>19</sup> Drainage of surface water, despite having survived so far the expansive trend of nuisance, makes no exception regarding the applicable rule, which remains in line with the fault-based liability rule associated with nuisance. Each of these categorisations and their respective liability rules will be discussed below.

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<sup>16</sup> *Hood v Williamsons* (1861) 23 D 496.

<sup>17</sup> See section 2.2.1 below.

<sup>18</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

<sup>19</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95.

## 2.1. Water uses as breaches of common interest

### 2.1.1. The doctrine of common interest

Highlighting its vulnerability to interference, Reid pointed out that “[i]n the use and enjoyment of [...] running water naturally present within his boundaries, a proprietor is peculiarly at the mercy of his neighbour”.<sup>20</sup> Running water creates a situation where a landowner, in using and enjoying his property can quite easily affect in a substantial manner his neighbour’s use and enjoyment of his own, and, at the same time, the former is susceptible to the same substantial interference by the latter’s use and enjoyment. These remarks can be extended to “standing” water: landowners surrounding a loch can equally, though perhaps less easily, interfere with each other’s enjoyment of property. Given the particular nature of water, the law of property developed a special doctrine that seeks to regulate private – and especially conflicting – uses of water: the doctrine of common interest. “Common interest, [...] is applied to that right arising from mutual interest in a subject which, although not amounting to common property, vests the parties interested with certain rights which they may legally vindicate”.<sup>21</sup> Consequently, it creates a network of reciprocal rights and obligations, positive and negative, whereby the parties interested in the same subject can restrict each other’s use and enjoyment of property in order to protect their own. The doctrine, in Reid’s view, has four main characteristics: “(1) [it] is a type of real condition; (2) it is found only where required by the physical proximity of benefited and burdened property; (3) it is ‘tacit’, arising automatically by operation of law; and (4) finally, [...] it is ‘open-textured’”.<sup>22</sup> It applies primarily to two types of subject: water and tenements.<sup>23</sup>

The relevant aspects of its application in the context of tenements, specifically to withdrawal of support disputes, are discussed in chapter 5.<sup>24</sup> In turn, a recent work has addressed in detail the history and content of the doctrine as applicable to

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<sup>20</sup> Reid, *Property* § 282.

<sup>21</sup> G Watson (ed), *Bell’s Dictionary and Digest of the Law of Scotland* (7th edn, 2012) 204.

<sup>22</sup> K G C Reid, “Common Interest. A Reassessment” (1983) 28 *JLSS* 428 at 429.

<sup>23</sup> See Reid, *Property* §§ 232-239, 282-290 and 307. For other subjects, see *ibid* (n 22) at 431.

<sup>24</sup> See chapter 5 sections 2.1.5 and 2.1.6.



water,<sup>25</sup> so such aspects will not be revisited here, except for some points that are relevant for the topic under discussion, particularly for the types of cases that most commonly give rise to damages claims.

The key aspects of this doctrine in their most common application, i.e. the case of running water,<sup>26</sup> are contained in what has been described as “the most important single contribution to the development of the law of riparian rights”:<sup>27</sup> Lord Neaves’ speech in the 1864 Inner House decision in *Bicket v Morris*,<sup>28</sup> where two opposite riparian proprietors held a dispute about certain building operations performed by the defender on his half of the bed. Lord Neaves, in describing “the protection of the natural flow”,<sup>29</sup> distinguished between the rights of successive proprietors and the rights of opposite proprietors. As to the former, he explained that

An upper heritor, after enjoying the use of the water which passes through his lands, has nothing more to do with it, unless some operation below shall operate to his prejudice by making it regorge, or stagnate, or decrease in velocity or freedom of flow within his property. A lower heritor has this interest in the stream, that in passing through the lands of others it *shall be transmitted to him undiminished in quantity, unpolluted in quality, and unaffected in force and natural direction and current, except in so far as the primary uses of it may legitimately operate upon it within the lands of the upper heritor*.<sup>30</sup>

With regard to opposite proprietors, after delimitating ownership over the bed or *alveus* of the river, he added that

besides this ordinary right of property [...] they have a common interest arising from another right, as they have each a right in the water, not of property -for certainly *aqua profluens* is not the subject of property as long as it is running. [...] But each heritor, as it passes, has a right of an incorporeal kind to the usufruct of that stream for domestic purposes and for agricultural purposes, and, it may, be also for other purposes, subject to certain restrictions. This right in the general current of the stream gives him an interest in the whole of the *alveus*, and for this obvious reason, that no operation can, by the nature of things, be performed upon one half of the *alveus*, that shall not affect the flow of the water in the whole. [...] Now the common interest, therefore, *amounts to a right of preventing anything that shall palpably affect the water*...<sup>31</sup>

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<sup>25</sup> J Robbie, *Private Water Rights* (2015), ch 5-7.

<sup>26</sup> For its application to lochs, see *ibid* §§ 6.56-6.58.

<sup>27</sup> Reid, *Property* § 282.

<sup>28</sup> *Morris v Bicket* (1864) 2 M 1082 at 1092-1093, affirmed by the House of Lords: *Bicket v Morris* (1866) 4 M (HL) 44.

<sup>29</sup> Robbie (n 25) §§ 7.33-7.35.

<sup>30</sup> *Morris v Bicket* (n 28) at 1092, emphasis added.

<sup>31</sup> *Ibid* at 1092-1093, emphasis added.

Many of the cases discussed in this chapter could be characterised as a breach of common interest. Certainly cases where a lower riparian owner claims to have suffered economic harm or damage to his property as a consequence of the pollution of a stream could fall within the emphasised section of the first paragraph transcribed above, in that water is allegedly not being transmitted “unpolluted in quality”. Yet, as will be explained, damages claims of this type are rarely framed in those terms and they do not fit the typical opposition between primary and secondary uses that prevails in interdict cases.<sup>32</sup>

More problematic are cases where the pursuer claims to have suffered physical damage to his property as a consequence of the action of water resulting from the defender’s operations on the stream. An alteration or interference with the course of a stream might constitute a breach of common interest in the case of both successive and opposite riparian owners, as highlighted by the emphasised sections of the paragraphs transcribed above. Yet some cases cannot be analysed in these terms simply because the pursuer is not a riparian owner. Certainly his property can be affected by the operations that a riparian owner has developed altering the natural flow of the stream, normally causing a flood. But as a neighbouring proprietor whose land is not *adjacent* to such watercourse, it is not possible to assert that he had common interest rights that entitled him to have that flow protected.

This was the case, for instance, in *MacFarlane v Lewis*<sup>33</sup> and *Pirie and Sons v Magistrates of Aberdeen*.<sup>34</sup> Most notably, the pursuer in the now controversial<sup>35</sup> leading case of *Caledonian Railway Co v Greenock Corp*<sup>36</sup> was not a riparian owner: the burn ran through the defenders’ land and as a consequence of their operations, altering the burn’s natural channel, it became incapable of dealing with a heavy rainfall, causing a flood. The water reached a road that was at the lowest level of the land, and flowed down this road to reach the pursuers’ property. In this type of cases, the doctrine of common interest cannot provide a basis for liability.

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<sup>32</sup> See p 186 below.

<sup>33</sup> *Macfarlane v Lewis* (1857) 19 D 1038.

<sup>34</sup> *Pirie and Sons v Magistrates of Aberdeen* (1871) 9 M 412.

<sup>35</sup> The case is the centre of the discussion in section 3 below.

<sup>36</sup> *Caledonian Rly Co v Greenock Corp* (n 13).

In any event, even for those situations where defender and pursuer are both riparian owners, damages claims have not in practice been based upon common interest,<sup>37</sup> as with pollution cases.

### 2.1.2. The basis of liability for breach of common interest

The affected riparian owner, in enforcing common interest rights, can claim damages as one of the available remedies.<sup>38</sup> In practice, however, common interest is rarely enforced in this way. As Robbie points out, damages claims were infrequent in the early case law,<sup>39</sup> and the picture is similar in modern law: of the damages claims associated with uses of water, very few are actually based upon the infringement of common interest rights. This hinders any conclusive statement about the basis of liability. The doctrine of common interest in the context of water seems to have been used mainly as a tool to stop or prevent certain uses of water rather than to deal with their aftermath.

This is clearly reflected in the foundation for damages claims arising from damage caused by the alteration of watercourses: they are not based on common interest, and this was the case even after the law was clarified by *Morris v Bicket*, which undoubtedly considered this type of operation as a breach. To an extent, this is consistent with the core object of the doctrine and the reason why it developed: the natural flow is protected primarily in order to make sure that all riparian owners can make full – or the fullest possible – use of the water.<sup>40</sup> Cases where physical harm of property is alleged depart from this logic, and this might be the reason why the doctrine is not invoked in them.

As to cases of water pollution, the few modern damages claims are not now concerned with the destruction of the primary (i.e. domestic) purposes of water, but mostly with competing uses for manufacturing purposes in streams or rivers where primary purposes are either already destroyed or not affected whatsoever, making the

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<sup>37</sup> See below.

<sup>38</sup> Reid, *Property* § 290; Robbie (n 25) § 7.93-7.95.

<sup>39</sup> Robbie (n 25) § 7.93.

<sup>40</sup> See p 183 above.

question of increase of pollution the key in determining whether common interest has been breached. The case of *Collins v Hamilton* translated this question into whether there was a nuisance,<sup>41</sup> a perspective that is discussed below.<sup>42</sup> In *Ewen v Turnbull's Trs*, in turn, the discussion concentrated on the form of the issue – whether it should include the contribution of other tenants higher up the stream – and other contractual aspects. The issue approved included the term “wrongfully”, which, as will be explained below, is a reference not necessarily indicative of the basis of liability,<sup>43</sup> and the point is not discussed further in the case.

The leading House of Lords case of *Young & Co v Bankier Distillery Co*<sup>44</sup> is a peculiar one, in that the quality of the water of the river was affected in a very specific way by the water discharged from the defender's mineral works: primary purposes were preserved, but the water was rendered harder and, therefore, not suitable for distillery purposes. It could hardly be said that there was a material increase of pollution, if there was any pollution at all.<sup>45</sup> Yet the court found for the pursuer. The case, however, is criticised for not really reflecting a strict common interest approach to riparian owner's rights.<sup>46</sup> Moreover, the infringement of common interest in the case seems to have been determined not only by the alteration of this very special quality of the water, but also by the fact that the defenders were artificially introducing water to the stream, altering not only its quality but also its quantity.<sup>47</sup> The House of Lords confirmed the award of damages for the injury caused to the pursuer's machines, but reference to or discussion of any fault on the part of the defender are absent both from the Court of Session's and the House of Lords' decisions, suggesting that liability for infringing common interest might be strict.

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<sup>41</sup> *Collins v Hamilton* (n 15) at 902 per Lord Cockburn.

<sup>42</sup> See section 2.2.1.

<sup>43</sup> See section 2.3.2.

<sup>44</sup> *Young & Co v Bankier Distillery Co* (n 15).

<sup>45</sup> Commenting on the case, Rankine equated the introduction of water that destroys an established manufactory purpose to the introduction of a chemical substance that alters the natural quality of the water: Rankine, *Land-Ownership* 563.

<sup>46</sup> Robbie (n 25) § 7.17. See, however, a case note published at the time, defending the correctness of the decision based on the irrelevance of the preservation of primary uses when the defender's activity is not itself a primary use: J C C Broun, “*Bankier Distillery Co v John Young & Co* (Note)” (1894) 6 JR 85 at 86.

<sup>47</sup> Reid, *Property* § 286.

Pointing in the opposite direction, the defenders were considered not to be liable for the economic loss caused to the pursuer's paper mill business in the case of *Edinburgh and District Water Trs v Sommerville & Son Ltd* precisely because no negligence could be attributed to them.<sup>48</sup>

There is a further damages case that was argued on the basis of common interest, but does not fit the two main groups of cases here identified: *Hood v Williamsons*.<sup>49</sup> The case was one of consumption of water for cattle watering purposes (primary use) on the part of the defender, depriving the pursuer's mill of water power and the ability to thrash a year's crop of grain. Yet this case does not provide any assistance because the defender was not found liable, as he was entitled to consume the water for primary purposes and there was no proof he had done otherwise. No discussion can be found in the decision about the defender's potential liability if, for instance, he had consumed the water for secondary purposes, or wasted the water not consumed for primary purposes.

Consequently, damages claims based on the doctrine of common interest, apart from being exceptional, do not provide a clear picture of the basis of such liability. At one time, the position seemed to be that liability was strict.<sup>50</sup> Nevertheless, the common position nowadays is that liability for infringement of common interest is fault-based,<sup>51</sup> according to the Inner House decision in *Thomson v St Cuthbert's Cooperative Association Ltd*<sup>52</sup> and further Sheriff Court authority following this decision.<sup>53</sup> These cases, admittedly, were concerned with the infringement of common interest in the context of withdrawal of support in tenements. It has been questioned whether the case of *Thomson* was correctly decided,<sup>54</sup> and the idea that

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<sup>48</sup> *Edinburgh and District Water Trustees v Sommerville & Son Ltd* (1906) 8 F (HL) 25, esp at 31 per Lord Macnaghten, which is altogether surprising when contrasted with his earlier opinion in *Young & Co v Bankier Distillery Co* (n 15) at 78, where no reference to any fault can be found.

<sup>49</sup> *Hood v Williamsons* (n 16).

<sup>50</sup> Law Reform Committee for Scotland, *Thirteenth Report: The Law relating to Civil Liability for Loss, Injury and Damage caused by Dangerous Agencies Escaping from Land* (1964) §§ 7 and 16.

<sup>51</sup> Reid, *Property* § 366; Robbie (n 25) § 7.94.

<sup>52</sup> *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380

<sup>53</sup> *Kerr v McGreevy* 1970 SLT (Sh Ct) 7; *Doran v Smith* 1971 SLT (Sh Ct) 46.

<sup>54</sup> Reid (n 22) at 434.

fault-based liability would deprive the doctrine of common interest from any content with regard to liability still resonates.<sup>55</sup> These aspects are discussed in chapter 5.<sup>56</sup>

## 2.2. Water uses as nuisances

### 2.2.1. Water disputes as nuisances: an evolution

From the two main types of cases identified above, water pollution cases were the first to be treated as nuisances, in the late eighteenth century. As Whitty points out, “[t]he intrusion of nuisance into the domain of water rights in Scotland begins with the two distillery cases of 1791”.<sup>57</sup> These are the cases of *Miller v Stein*<sup>58</sup> and *Russell v Haig*,<sup>59</sup> where the defenders in both cases were interdicted from discharging the refuse originated by their distilleries into the streams running through the respective pursuers’ lands, on the basis that such discharge constituted a nuisance insofar as it destroyed the stream’s primary uses.

Thereafter, most cases of water pollution throughout the nineteenth century consistently followed this pattern: they were disputes between neighbours making competing uses of water, where one sought to interdict the other’s use, alleging that it was a nuisance, either because it destroyed some uses of the water – normally primary uses – or it affected the amenity of the land. The very few cases of damages claims based upon pollution of water, however, were not consistently treated as nuisances until the early twentieth century,<sup>60</sup> and even since then it is possible to find occasional exceptions.<sup>61</sup>

Alterations of or interferences with the natural course of a stream did not enter the realm of nuisance until later in the twentieth century, with the case of *Gourock*

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<sup>55</sup> Robbie (n 25) § 7.94.

<sup>56</sup> See p 234 below.

<sup>57</sup> N R Whitty, “Water Law Regimes” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000) at 465.

<sup>58</sup> *Miller v Stein* (1791) Mor 12823.

<sup>59</sup> *Russell v Haig* (1791) Mor 12823.

<sup>60</sup> From the case of *Fleming v Gemmill* 1908 SC 340 onwards.

<sup>61</sup> See *East Lothian Angling Association v Haddington Town Council* 1980 SLT 213 and the more recent case of *Southesk Trust Co Ltd & Elsick Farms Ltd v Angus Council* [2006] CSOH 6.

*Ropework Co Ltd v Greenock Corp*,<sup>62</sup> but virtually no exceptions can be found since that time. The consequence of this incorporation is that these disputes are now governed by two sets of previous case law: cases that fit their factual pattern but were not, at their time, considered to be nuisances; and cases that qualify as nuisances in its more traditional sense, where no physical harm to property is caused.

### 2.2.2. The basis of liability in nuisance

The conceptual treatment of water disputes as nuisances brings with it the application of the nuisance liability rule.

The issue of the basis of liability in nuisance and the difficulties that it has created have been discussed in chapter 2, so the particulars are not revisited here. It is nowadays accepted that liability in nuisance is fault-based according to the House of Lords decision in the leading case of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.<sup>63</sup> But before this decision, the matter was not settled and there was indeed authority pointing towards a rule of strict liability.

After *RHM Bakeries*, the case of *Argyll and Clyde Health Board v Strathclyde Regional Council* highlighted the need to clarify what amounted, in this context, to an averment of fault. In the case, the court pointed out that it was not enough to plead simply “fault” or “lack of care” to make a case relevant: it was necessary to specify facts from which a fault inference could be made.<sup>64</sup> Further clarification, particularly as to the forms of fault that could be pleaded, came with the Inner House decision in *Kennedy v Glenbelle Ltd*: fault encompasses not only negligence, but also other forms of fault, ranging from malice to engaging in dangerous conduct.<sup>65</sup>

This evolution is reflected in the way damages claims have been decided: if before *RHM Bakeries* it was possible to find some cases where, at least, the basis of liability was not clear,<sup>66</sup> after this decision liability has been treated consistently as

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<sup>62</sup> *Gourock Ropework Co Ltd v Greenock Corp* 1966 SLT 125.

<sup>63</sup> *RHM Bakeries* (n 18) at 39-45 per Lord Fraser of Tullybelton.

<sup>64</sup> *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SLT 381 at 383.

<sup>65</sup> *Kennedy* (n 19) at 99-100 per Lord President Hope.

<sup>66</sup> See, e.g. *Fleming v Gemmill* (n 60) and *Hanley v Edinburgh Magistrates* 1913 SC (HL) 27.

fault-based.<sup>67</sup> Moreover, between *RHM Bakeries* and *Kennedy* cases were based in negligence as the relevant form of fault, but after *Kennedy*, pursuers started exploring the other forms of fault offered, particularly recklessness and intention as knowledge of the certainty of harm.<sup>68</sup>

## 2.3. Water uses as “wrongs”

### 2.3.1. Fault and wrong

A few nineteenth century cases were not categorised under the particular labels of nuisance or breach of common interest. Instead, they were discussed in light of the notion of “wrong”, that is, they addressed the question of whether there was a wrong or whether the defender had acted wrongfully, especially in cases where the harm complained of was physical damage to property.<sup>69</sup> The implications of requiring wrongfulness<sup>70</sup> or including wrongfulness in the issues,<sup>71</sup> are not entirely clear, however.

Unlike jurisdictions where a separate requirement of – objective – unlawfulness or wrongfulness must be fulfilled, such as German<sup>72</sup> and South African law,<sup>73</sup> Scots law does not feature a separate wrongfulness requirement. Some writers have sought to equate wrongfulness with fault. Hogg has argued that “for conduct to be wrongful it must exhibit fault on the part of the wrongdoer”.<sup>74</sup> This seems to be in line with Guthrie Smith’s views: even though in the opening pages of his treatise he identified

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<sup>67</sup> *Nobles Trustee’s v Economic Forestry (Scotland) Ltd* 1988 SLT 662; *Hugh Blackwood (Farms) Ltd v Motherwell District Council* 1988 GWD 30-1290; *Logan v Wang (UK) Ltd* 1991 SLT 580; *G A Estates Ltd v Caviapen Trustees (No 1)* 1993 SLT 1037; *Anderson v White* 2000 SLT 37; *Summers v Crichton* Unreported (1 December 2000); *Viewpoint Housing Association Ltd v City of Edinburgh Council* 2007 SLT 772; [2007] CSOH 114; *Black Loch Angling Club v Tarmac Ltd* 2012 SCLR 501; and *Esso Petroleum Co Ltd v Scottish Ministers* 2015 GWD 7-134; [2015] CSOH 21.

<sup>68</sup> See *Anderson* (n 67) and *Esso Petroleum Co Ltd* (n 67).

<sup>69</sup> *Samuel v Edinburgh & Glasgow Railway Co* (1850) 13 D 312; *Ewen v Turnbull’s Trustees* (1857) 19 D 513; *Macfarlane v Lewis* (n 33)

<sup>70</sup> As in *Samuel v Edinburgh & Glasgow Railway Co* (n 69) at 313 per Lord Cockburn.

<sup>71</sup> As in *Ewen v Turnbull’s Trustees* (n 69) at 515; and *Macfarlane v Lewis* (n 33) at 1040.

<sup>72</sup> B S Markesinis and H Unberath, *A Comparative Introduction to the German Law of Torts* (2002) 79-83; K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, 1998) 599.

<sup>73</sup> J C van der Walt and J R Midgley, *Principles of Delict* (3rd edn, 2005) § 103; J Neethling and J M Potgieter, *Neethling - Potgieter - Visser Law of Delict* (7th edn, 2006) ch 3.

<sup>74</sup> M Hogg, *Obligations* (2nd edn, 2006) §§ 3.04-3.05.



as a legal wrong any violation of the duty not to injure the rights of other members of society,<sup>75</sup> later pages stated that the obligation of reparation arises from the *illegality* of an act, “and there can be no violation of the precept *alterum non laede* in any other way”.<sup>76</sup> “An illegal act may be—1. An act directly contrary to the law (*damnum directum dolosum*). 2. An act legal in itself, but illegally done, *i.e.* through negligence or imprudence (*damnum culposum*)”.<sup>77</sup> In other words, in looking for *dole* or *culpa*, he seems to contend that the violation of the duty is wrongful *because* there is fault.

Other contemporary accounts advance a different answer, however, and one that is more in line with Guthrie Smith’s initial definition of a wrong. In Birks view, for instance, the key element of a wrong is the breach of a duty.<sup>78</sup> But duties can be legally designed so that they might or might not require fault for their breach.<sup>79</sup> As Stevens has pointed out in the exposition of his “rights model” of English tort law, “[j]ust as not all blameworthy conduct is wrongful, not all wrongful conduct is blameworthy”.<sup>80</sup>

This view is consistent with contemporary Scottish accounts of delictual liability. For Walker, “wrongfulness consists solely in the actual or potential infringement of a legally protected interest vested in the complainer”,<sup>81</sup> but subsequently remarked that the notion of “wrong” is unhelpful, and is not a requirement but actually a consequence of delictual conduct.<sup>82</sup> In the particular context of nuisance, in turn, Whitty submitted more clearly that wrong is not the same as fault and “can exist independently of fault”.<sup>83</sup>

Moreover, delictual remedies are awarded in Scotland, in some circumstances, for wrongs in the absence of fault. For instance, the key requirement of interdict is precisely a wrong done or threatened, and the remedy is indeed seen as one to stop

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<sup>75</sup> Guthrie Smith, *Reparation* 2.

<sup>76</sup> *Ibid* 7.

<sup>77</sup> *Ibid* 8.

<sup>78</sup> P Birks, “The Concept of a Civil Wrong” in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) at 37, emphasis added.

<sup>79</sup> *Ibid* at 42.

<sup>80</sup> R Stevens, *Torts and Rights* (2007) 99.

<sup>81</sup> Walker, *Delict* 36.

<sup>82</sup> *Ibid* 37.

<sup>83</sup> Whitty, “Nuisance” (reissue) § 90.

or prevent wrongs,<sup>84</sup> yet no fault is required. This is quite commonly seen in operation in nuisance cases.<sup>85</sup>

The conclusion is that the notions of wrongfulness and wrong are unhelpful in shedding light upon the basis of liability, i.e. whether liability is fault-based or strict.

### 2.3.2. The basis of liability for wrongs

Consequently, the fact that the cases identified above required wrongfulness or included the notion of wrongfulness in the issue does not mean that in those cases liability was fault-based – nor strict. It is necessary to turn to other elements in the case to elucidate the basis of liability. There is, however, no identifiable pattern.

In the case of *Samuel v Edinburgh & Glasgow Railway Co* the judges were sceptical towards liability based solely upon the occurrence of the flood damage, and directed that the issue should include inquiry as to the adequacy of the works instructed by the defenders.<sup>86</sup> In *Ewen v Turnbull's Trs* the main discussion focused on the materiality of the pollution<sup>87</sup> and no reference to any aspect of fault was considered. Finally, the case of *MacFarlane v Lewis* does not contain a discussion of fault, though Lord President McNeill's dictum seems to associate wrongfulness with the way in which the operations were performed, rather than their harmful result.<sup>88</sup>

## 2.4. Drainage of surface water

### 2.4.1. The right to drain surface water and the duty to receive it

Avoiding the labels previously discussed, drainage of surface water remains to this day largely a separate category, with the exception of the case where the complaint is

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<sup>84</sup> H Burn-Murdoch, *Interdict in the Law of Scotland: with a Chapter on Specific Performance* (1933) 1 and 86.

<sup>85</sup> See *RHM Bakeries* at 44 per Lord Fraser of Tullybelton. Whitty, however, argues that in these cases the interference is intentional, or at least becomes intentional when the defender finds out about the claim: Whitty, "Nuisance" (reissue) § 94.

<sup>86</sup> *Samuel v Edinburgh & Glasgow Railway Co* (n 69) at 315.

<sup>87</sup> *Ewen v Turnbull's Trustees* (n 69) at 516 per Lord Justice-Clerk Inglis.

<sup>88</sup> *Macfarlane v Lewis* (n 33) at 1039-1040.

for pollution of such water, which is treated as a nuisance in line with other cases of pollution of water.<sup>89</sup>

According to Reid, surface water is that “which arises in the course of nature, whether from the sky or from neighbouring land, and which then lies on the surface of land without occupying any definite channel”.<sup>90</sup> The rights and duties associated with drainage of surface water are outlined by Erskine:

Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which he is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior, in the natural use of his property, for draining his lands, or otherwise improving them, the owner of the inferior tenement is, without the positive constitution of any servitude, bound to receive that body of water on his property, though it should be endamaged by it. *But as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior grounds, the question, How far it may be extended under particular circumstances? must be arbitrary.*<sup>91</sup>

Lord Justice-Clerk Inglis, commenting on this paragraph in the case of *Campbell v Bryson*, identified in the emphasised sentence the “proper qualification” of the doctrine:

if the inferior heritor complains that the superior heritor is unduly pressing his right, and making the servitude intolerable to him, he will have the right to come to the Court with his complaint, and the Court will be entitled to regulate the matter between the two upon equitable terms.<sup>92</sup>

These two formulations remain the main authority on the point<sup>93</sup> and are cited in modern cases.<sup>94</sup> It must be noted that this authority categorises the doctrine as a “natural” servitude, an inaccurate label according to the modern understanding and regulation of servitudes.<sup>95</sup>

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<sup>89</sup> *Hugh Blackwood (Farms) Ltd* (n 67).

<sup>90</sup> Reid, *Property* § 340.

<sup>91</sup> Erskine, *Institute* 2.9.2, emphasis added.

<sup>92</sup> *Campbell v Bryson* (1864) 3 M 254 at 260.

<sup>93</sup> See Rankine, *Land-Ownership* 514; Reid, *Property* § 339; Gordon & Wortley, *Land Law* § 6-62). Other Institutional writers who address the point are less frequently cited as authority: Bankton, *Institute* 2.7.30; and Bell, *Principles* §§ 968-969.

<sup>94</sup> *Noble's Trs* (n 67) at 664; *Logan* (n 67) at 584.

<sup>95</sup> Reid, *Property* § 442.

Drainage operations can give place to two types of claims: the inferior proprietor's claim that the operations performed by the superior are increasing the burden placed on him by law, or the superior proprietor's claim that the operations performed by the inferior are preventing him from exercising his right to drain. The superior proprietor is not bound to drain the land; he is free to use the surface water present in his land, subject to the limitation of *aemulatio vicini*.<sup>96</sup> There is authority to the effect that he is the owner of such water.<sup>97</sup> Consequently, apart from operations *in aemulationem*, the inferior proprietor cannot raise a claim for being deprived of surface water that would have naturally flowed to his land.

In both cases, the pursuer can ask for interdict and/or damages, and for both remedies the common requirement is the one identified by Erskine and Lord Justice-Clerk Inglis: the right must have been overstretched or unduly pressed. The meaning of this requirement is not entirely clear, and the Lord Ordinary (Prosser) in the case of *Logan v Wang* attempted an explanation:

[F]or a pursuer to succeed with such a claim, it would in my view be for him to aver and prove not merely that there have been damaging consequences from the development in question, and not merely that the consequences for him might be described as "intolerable", but that the actions of the superior heritor are themselves open to criticism as being an undue pressing of his rights, "*without necessity*" in the sense of being *unreasonable or gratuitous*. It may indeed be that the actions must amount to actings *in aemulationem vicini*...<sup>98</sup>

The dictum points to necessity and reasonableness of the operations as the criteria to determine whether the right is overstretched or unduly pressed. The requirement for actings to be *in aemulationem*, however, renders the success of most claims impossible: the standard is "unduly high".<sup>99</sup> Moreover, *aemulatio* can be seen in itself as a form of fault (i.e. by definition requiring malice),<sup>100</sup> rendering any further requirement of fault superfluous. Yet, as explained below, fault is required for damages claims as a separate requirement.

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<sup>96</sup> Ibid § 338.

<sup>97</sup> *Crichton v Turnbull* 1946 SC 52, though Gordon & Wortley, *Land Law* § 6-61 point out that this solution is criticised.

<sup>98</sup> *Logan* (n 67) at 584, emphasis added.

<sup>99</sup> Reid, *Property* § 340 n 12.

<sup>100</sup> See chapter 2 section 3.

#### 2.4.2. The basis of liability for drainage of surface water

In the first type of claim, namely where the inferior proprietor argues that the operations performed by the superior proprietor in draining his land are causing him damage, modern case law has clearly identified fault as a separate requirement from that of undue pressing of the right.

The point is discussed in *Noble's Trustees v Economic Forestry (Scotland) Ltd.*<sup>101</sup> According to the Lord Ordinary (Jauncey), Lord Justice-Clerk Inglis' explanation of Erskine's formulation in *Campbell v Bryson* – acknowledging the affected landowner's right to come to the court with the complaint – did not mean necessarily that the defender would be held liable to pay damages. There was, in his view, no reason to differentiate for these purposes between nuisance and this “servitude”, so fault should be required if the remedy sought by the pursuer is damages.<sup>102</sup> It can be observed that the Lord Ordinary maintained the category of drainage of surface water separate from nuisance, despite treating them as equivalent regarding the basis of liability.

The judgment in *Logan v Wang* simply confirmed the requirement of fault by reference to *Noble's Trs*,<sup>103</sup> as the key discussion in the case was about the other requirement of the claim. Yet there is one noteworthy aspect: in confirming the requirement of fault, the Lord Ordinary (Prosser) referred also to *RHM Bakeries* as authority. This reference raises the question whether he considered the nuisance rule to be applicable to the case and, more generally, whether the category of surface water will be able to resist the expansion of nuisance. The reference, however, might be justified given that Lord Jauncey in *Noble's Trs* also cited *RHM Bakeries* as authority.<sup>104</sup> But the reference in *Noble's Trs* was intended to substantiate a different point: it sought to highlight *RHM Bakeries'* reference, in turn, to the English case *Sedleigh-Denfield v O'Callaghan*<sup>105</sup> as authority for the proposition that interdict and

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<sup>101</sup> *Noble's Trs* (n 67).

<sup>102</sup> *Ibid* at 664.

<sup>103</sup> *Logan* (n 67) at 583.

<sup>104</sup> *Noble's Trs* (n 67) at 665.

<sup>105</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

damages can have different requirements, making it possible to require fault for the latter without doing so for the former.

As to the second type of claim, namely where the superior proprietor holds that the operations performed by the inferior proprietor are preventing him from exercising the right to drain the surface water, there is no clear authority. In *Plean Precast Ltd v National Coal Board*,<sup>106</sup> this claim was made, and the defender was held strictly liable. Yet the case was not treated as an infringement of the right to drain surface water, but rather as a case of alteration of a natural (defined) watercourse: the surface water drained into a natural stream, and this stream was culverted and diverted.<sup>107</sup>

There seems to be no reason to differentiate between the claim raised by the inferior proprietor and that of the superior heritor with regard to the rights under analysis and, given that the decision in *Plean Precast Ltd* was based on rules applicable to a different factual setting, there is no authority supporting a departure from the general fault-based liability rules. Extending the argument advanced in *Noble's Trs*, there are no reasons to treat nuisance and this case differently.

## 2.5. Overview: convergence of liability rules.

The analysis developed so far brings out, in the first place, the issue of the relation between nuisance and the doctrine of common interest.

Whitty points out that “[s]everal commentators treat pollution of streams as part of nuisance, so that alteration of flow infringes common interest whereas deterioration of quality is nuisance”,<sup>108</sup> but then holds that the relation is better described as one of overlap, where common interest is reserved only for riparian owners whereas nuisance would protect owners that do not hold such status.<sup>109</sup>

Within the area of overlap, there is a contrast between the respective applicable rules. It is believed that the *plus quam tolerabile* test from nuisance might provide a

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<sup>106</sup> *Plean Precast Ltd v National Coal Board* 1985 SC 77.

<sup>107</sup> The case is discussed below: see section 3.1.

<sup>108</sup> Whitty (n 57) at 460-461, references omitted.

<sup>109</sup> *Ibid* at 461 n 389.

more flexible standard than the primary/secondary uses distinction from common interest,<sup>110</sup> but setting the threshold of liability at a higher level, with the consequence that relief that is not available under nuisance might be so under common interest.<sup>111</sup> The support for this contention is scant, though the case of *Young & Co v Bankier Distillery Co*<sup>112</sup> seems to lend some support: in terms of the law of nuisance, the case would likely have failed due to the hypersensitivity of the particular activity carried out by the pursuer (whisky distilling). It is doubtful, however, that the case was correctly decided under the rules of common interest,<sup>113</sup> leaving the contention rather unsupported.

Nevertheless, whatever the relation between the two doctrines, it does not make a difference with regard to the basis of liability. These doctrines have evolved to reach a convergence: both under nuisance and under common interest, liability is nowadays, at least as a general rule, fault-based, whatever the criticism of this rule in each realm. Consequently, from the perspective of the requirement of fault, it does not make a difference which is cited as the basis of the claim.

The only possible difference would be determined by the scope of application of *Kennedy*. If *Kennedy* is to be regarded of general application, beyond the realm of nuisance – which seems to be implied in the wording of Lord President Hope’s dictum<sup>114</sup> – then the conclusion is that it makes no difference to invoke one or the other doctrine. If, on the other hand, *Kennedy* is restricted to nuisance only – which so far has been its only field of application in practice<sup>115</sup> – it might actually be easier to obtain damages under this doctrine in its current state. As argued in chapter 2, the way in which the *Kennedy* model has been understood leads to the conclusion that liability based on recklessness or on intention as knowledge comes very close to strict

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<sup>110</sup> Ibid.

<sup>111</sup> Reid, *Property* § 299; Robbie (n 25) § 7.58.

<sup>112</sup> *Young & Co v Bankier Distillery Co* (n 15).

<sup>113</sup> See p 187 above.

<sup>114</sup> *Kennedy* (n 19) at 99: “*Culpa* which gives rise to a liability in delict may take various forms”, proceeding to refer to the different forms of fault outlined by Whitty, “Nuisance” § 2087. The “judicial consideration” of *culpa* from *Kennedy* is also discussed in the section on general principles of delict in H L MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (13th edn, 2012) § 25.07.

<sup>115</sup> A search of cases where *Kennedy* is referred to as authority outside the realm of nuisance was unsuccessful.

liability, for constructive knowledge of the likelihood or the certainty of damage, respectively, is considered as sufficient.<sup>116</sup>

Now, the question would be of consequence only if the overlap of the two doctrines left outside its scope an area of “common interest-not-nuisance” where pursuers could not resort to the advantages of the broad understanding of fault in nuisance. But this does not seem to be the case. Indeed, in Whitty’s description, the contrary holds good: the overlap leaves, for non-riparian owners, an area of “nuisance-not-common interest”. Consequently, for breaches of common interest, nuisance rules appear always to be available.

This, however, is not the case in the context of drainage of water. It has been explained that liability arising from an infringement or “overstretching” of the right to drain surface water is fault based,<sup>117</sup> so in this sense, the rule is in line with nuisance and common interest rules. But the question remains whether, in claiming damages associated with harm caused in drainage operations, the pursuer can benefit from the advantages of the *Kennedy* formulation. If surface water drainage disputes end up being absorbed by nuisance, the question becomes irrelevant, but as long as the disputes are dealt with as a separate category, the issue can be of great practical relevance and there is no authority with which to formulate an answer.

## 2.6. Conclusion

In sum, it is possible to identify, in the first place, a taxonomical convergence: most disputes over uses of water are treated today as nuisances, with the exception of disputes arising from drainage operations. In the second place, there is also a convergence with regard to the basis of liability, this time including disputes arising from drainage operations: in damages claims, fault must be averred and proved.

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<sup>116</sup> See chapter 2 sections 4.2.3 and 6.2.2.

<sup>117</sup> See section 2.4.2 above.



### 3. THE EXCEPTION: STRICT LIABILITY FOR ALTERATION OF WATERCOURSES

In his dictum in *RHM Bakeries*, Lord Fraser identified the one decision that seemed to be at odds with the general fault-based liability rule advanced for nuisance: the case of *Caledonian Railway Co v Greenock Corp*.<sup>118</sup> In his analysis of the decision, some dicta seemed to have supported a strict liability rule, whereas others appeared to have relied on fault. In any case, he regarded the decision as inapplicable to the facts in *RHM Bakeries*, where no natural stream diversion was under discussion. “It may be”, he continued,

that that case should be regarded as laying down a special rule applicable only to the case of person who interferes with the course of a natural stream. If so, it is contrary to a general principle of the law of Scotland and, in my opinion, the rule should not be extended beyond the precise facts of that case.<sup>119</sup>

The next landmark nuisance case, *Kennedy v Glenbelle Ltd*, simply confirmed the status of “possible exception” of the *Caledonian Rly Co* rule.<sup>120</sup>

The status of this possible exception has been the object of recent discussion: after several decades of being considered a case of strict liability, its position has been substantially challenged. The traditional (section 3.1) and the new (section 3.2) view of the case are explored here, in order to argue that it is still possible to maintain the traditional – strict liability – view of *Caledonian Rly Co*, albeit not its traditional explanation. This conclusion is reached partly by identifying difficulties in the reasons advanced to justify a fault-based view, but fundamentally by agreeing with the last of these reasons, while at the same time offering a different construction of it: alteration of a watercourse can, in the relevant circumstances, be considered “conduct causing a special risk of abnormal damage” in the sense of the *Kennedy* catalogue of types of fault,<sup>121</sup> or “abnormally dangerous conduct”, as labelled in chapter 3. Yet liability based upon this particular type of conduct, as argued in that chapter, and contrary to what *Kennedy* states, is more accurately described as strict liability (section 3.3).

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<sup>118</sup> *Caledonian Rly Co v Greenock Corp* (n 13).

<sup>119</sup> *RHM Bakeries* (n 18) at 42.

<sup>120</sup> *Kennedy* (n 19) at 98.

<sup>121</sup> *Ibid* at 99-100.

Consequently, the rule should not be limited to the alteration of watercourses (section 3.4). These conclusions, unfortunately, have not yet been tested judicially (section 3.5).

### 3.1. The traditional view of the *Caledonian Rly Co* case

The facts in *Caledonian Rly Co* were discussed in chapter 3.<sup>122</sup> As explained, most of the discussion was focused on whether there had been *damnum fatale* in the case. Yet the dicta contain relevant statements about the basis of the defenders' liability, an aspect that is addressed in more detail here.

Possibly the speech that contains the strongest suggestion that liability was strict is the Lord Chancellor's (Finlay).<sup>123</sup> He considered that the law applicable to an interference with the natural course of a stream was that stated in *Kerr v Earl of Orkney*,<sup>124</sup> as discussed and approved by the House of Lords in the case of *Tennent v Earl of Glasgow*.<sup>125</sup> These cases, in his view, justified the proposition by Rankine, according to which

The sound view seems to be, that even in the case of an unprecedented disaster the person who constructs an *opus manufactum* on the course of a stream or diverts its flow will be liable in damages, provided that the injured proprietor can show – (1) that the *opus* has not been fortified by prescription; and (2) that but for it the phenomena would have passed him scathless.<sup>126</sup>

This paragraph contains what appears as a rule of liability based solely upon causation, without consideration of the defender's fault. Rankine's proposition was also approved in *Caledonian Rly Co* by Lord Dunedin as an accurate statement of the law.<sup>127</sup>

Lord Shaw's dictum can also be read as lending support for a strict liability rule. In his view, "[a] person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level

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<sup>122</sup> See p 110 above.

<sup>123</sup> *Caledonian Rly Co v Greenock Corp* (n 13) at 59-63.

<sup>124</sup> *Kerr v Earl of Orkney* (1857) 20 D 298.

<sup>125</sup> *Tennent v Earl of Glasgow* (1864) 2 M (HL) 22.

<sup>126</sup> Rankine, *Land-Ownership* 376.

<sup>127</sup> *Caledonian Rly Co v Greenock Corp* (n 13) at 63.

as secure against injury as they would have been had nature not been interfered with”.<sup>128</sup> And the same can be said of Lord Wrenbury’s speech, when he states that “[t]o construct a reservoir on your own land is a lawful act. To close or divert the natural line of flow so as to render it less efficient is not. It has never been held that in such a case there is not liability”.<sup>129</sup> Lord Parker’s dictum, on the other hand, focuses on the question about *damnum fatale*, without making relevant remarks about the basis of liability.<sup>130</sup>

These dicta served as the ground for the dominant doctrinal view – at the time of *RHM Bakeries* – of *Caledonian Rly Co* as supporting a strict liability rule.<sup>131</sup> Notably, the Law Reform Committee for Scotland recognised in their *Thirteenth Report* that *Caledonian Rly Co* interpreted and applied the rule in *Kerr v Earl of Orkney* as one of strict liability.<sup>132</sup>

The view had its detractors. Glegg’s editor explained the rule as “a strong presumption of negligence”, highlighting that in all cases of *novum opus* there was actually fault on the defenders.<sup>133</sup> Walker, in turn, despite labelling it as a “strict liability” rule, described it as an “imposition of a high standard of care [...] coupled with a ready presumption of fault where harm has resulted”, a rule that might be regarded as risk-based yet developed out of fault liability.<sup>134</sup> In his view, Lord Shaw’s contention that there was no difference between English and Scots law in this point<sup>135</sup> might have been true “in result, but is not so in legal principle”.<sup>136</sup> It is worth noting that the Law Reform Committee adopted the position described by Walker more generally for the escape of dangerous agencies, but kept *Caledonian Rly Co* separate as a case of strict liability.<sup>137</sup> The explanation was, in the words of the

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<sup>128</sup> Ibid at 65-66.

<sup>129</sup> Ibid at 68-69.

<sup>130</sup> Ibid at 67-68.

<sup>131</sup> E.g. H McKechnie, “Reparation” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 12 (1931) at § 1070; W A Elliot, “What is Culpa?” (1954) 66 JR 6 at 23; K W B Middleton, “Liability without Fault” [1960] JR 72 at 74.

<sup>132</sup> Law Reform Committee for Scotland (n 50) at § 16. See also the comments by E M Clive, “The Thirteenth Report of the Law Reform Committee for Scotland” [1964] JR 250 at 256-257.

<sup>133</sup> A T Glegg, *The Law of Reparation in Scotland* (J L Duncan ed, 4th edn, 1955) 321.

<sup>134</sup> Walker, *Delict* 983.

<sup>135</sup> *Caledonian Rly Co v Greenock Corp* (n 13) at 65.

<sup>136</sup> Walker, *Delict* 981.

<sup>137</sup> See p 119 above.

Committee, that “in all these cases, in which natural streams were involved, the cause of action was based on an infringement of the various proprietary rights and interests established by law, and not on failure to take reasonable care”.<sup>138</sup> No clear justification was offered for the exception, and the issue seems doubtful for, as has been mentioned, the pursuer in *Caledonian Rly Co* was *not* a riparian owner.<sup>139</sup> It is likely that these dissenting views, especially that of Walker who is indeed cited in the decision,<sup>140</sup> influenced the opinions in *RHM Bakeries*.

The courts, in turn, seemed to have fallen in with the dominant view of the case as the application of a strict liability rule. Two Outer House cases lent support to this view. First, in *Stirling v North of Scotland Hydro-Electric Board*,<sup>141</sup> damage to the pursuers’ property was caused by the breach of a river embankment and subsequent flooding that resulted, in turn, from the discharge of waters by the defenders after an “abnormal” rainfall. The court considered that the law as stated in the *Caledonian Rly Co* case was applicable to the facts under discussion, according to which, approving and applying *Kerr*, “liability lay in the fact that the damage would not have occurred had the stream been left in its natural condition”, under reference to the Lord Chancellor’s and Lord Dunedin’s approval of Rankine’s proposition.<sup>142</sup> Consequently, liability was regarded as based on causation and, on this very ground, the pursuers failed: they did not attempt to prove that, if nature had been left undisturbed, the flood would not have happened. It could be objected that if the pursuers had not failed on causation, we do not know with certainty whether the court would have required fault, but this is unlikely since the case adopted the *Caledonian Rly Co* rule without any qualification.

It must be noted that in this case, the flow was not “altered” in the same way it was in *Caledonian Rly Co*: water was added to it. Yet the Court considered that the rule in *Caledonian Rly Co* was equally applicable since the operations increased the natural burden of a watercourse.

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<sup>138</sup> Law Reform Committee for Scotland (n 50) § 7.

<sup>139</sup> See p 185 above.

<sup>140</sup> *RHM Bakeries* (n 18) at 41.

<sup>141</sup> *Stirling v North of Scotland Hydro-Electric Board* 1965 SLT 229.

<sup>142</sup> *Ibid* at 233.

The facts of the second case are closer to those in the *Caledonian Rly Co* case: in *Plean Precast Ltd v National Coal Board*,<sup>143</sup> a stream had been culverted, and the culvert became blocked and collapsed at the point where it diverted the natural course, flooding the pursuer's land. The court concluded that but for the existence of the culvert, damage would not have happened,<sup>144</sup> and having "interfered with the natural course of things", the defenders were liable according to *Caledonian Rly Co* and the previous case of *Hanley v Edinburgh Magistrates*.<sup>145</sup> The finding of liability was further grounded in the nuisance branch of the Inner House decision in *RHM Bakeries*,<sup>147</sup> in which liability was based solely upon causation.<sup>148</sup> The latter judgment, however, was reversed in the House of Lords, affirming, as mentioned above,<sup>149</sup> the fault requirement for damages claims in nuisance. It has been questioned, in consequence, whether the finding of liability in *Plean Precast Ltd* would survive the House of Lord decision in *RHM Bakeries*,<sup>150</sup> but it must be noted that the latter decision undermines only one of the two grounds for liability: that of nuisance. The other ground – the rule from *Caledonian Rly Co* – was recognised in the *RHM Bakeries* case itself as a possible exception.

In sum, there was at the time of *RHM Bakeries*, with some exceptions, doctrinal and judicial support for the strict liability view of the rule in *Caledonian Rly Co*. After *RHM Bakeries*, however, both doctrinal and judicial support started to decline. What before was mostly identified by scholars as an application of strict liability started not long after to be considered only as a "possible exception" to the fault rule established by *RHM Bakeries*,<sup>151</sup> or even "likely [to be] dependent upon *culpa*".<sup>152</sup> Only Zimmermann and Simpson still considered the case to be undoubtedly one of strict liability, even though it rested uneasily with *RHM Bakeries* and its restrictive scope

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<sup>143</sup> *Plean Precast Ltd v National Coal Board* (n 106).

<sup>144</sup> *Ibid* at 85.

<sup>145</sup> *Hanley v Edinburgh Magistrates* (n 66).

<sup>146</sup> *Plean Precast Ltd v National Coal Board* (n 106) at 86.

<sup>147</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SLT 3.

<sup>148</sup> *Plean Precast Ltd v National Coal Board* (n 106) at 87.

<sup>149</sup> See p 190.

<sup>150</sup> Reid, *Property* § 339 n 3.

<sup>151</sup> Whitty, "Nuisance" § 2093.

<sup>152</sup> K Miller, "Obligations: Obligations Imposed by Force of Law: Strict Liability" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 15 (1995) § 195.

seemed to an extent unjustified.<sup>153</sup> Courts, on the other hand, seemed reluctant to part with the strict liability rule, although the two cases in which the rule was considered were Outer House cases and did not actually apply it.

The facts in the case of *G A Estates Ltd v Caviapen Trustees (No 1)*<sup>154</sup> were similar to those in *Caledonian Rly Co*: a stream was diverted and culverted but after a heavy rainfall the culvert proved insufficient to carry the whole water of the stream increased by the rainwater drainage. The affected proprietors, defenders in a claim for certain payments under a contract, filed a counterclaim against the pursuer seeking to recover the cost of preventative works for further flood. The Lord Ordinary (Coulsfield) explained the rule of liability as follows:

As was explained in *RHM Bakeries*, in a case of nuisance the liability of the occupier of land from which the agency escapes is based upon fault, and derives from the construction of the *opus manufactum*. The reasoning is that, in a case in which there is liability, either the work could not be constructed in such a way as to avoid harm to a neighbouring property, in which case there was fault in building it at all, or the work was built negligently. The liability, therefore, does not arise simply from the fact that the agency escapes on an occasion or occasions, but from the action of constructing the *opus manufactum*. Similarly, in my view, any strict liability arising from interference with the flow of a stream must arise from the action of constructing the work which interferes.<sup>155</sup>

Lord Coulsfield recognised the difficulty in applying nuisance principles due to the fact that the culvert was, at the time of the flood, situated in the land of the defenders – the affected proprietors, who had in turn bought the land from the pursuers with the culvert already completed. There was further difficulty in the fact that the work was built for the benefit of both parties,<sup>156</sup> and there was “likely to be even greater difficulty in applying *any principle of strict liability*”, so that this issue was left to be decided after proof.<sup>157</sup> Consequently, the court seemed to have distinguished between the nuisance rule of fault-based liability, and a possibly applicable strict liability rule. The distinction is, however, somewhat odd, for it grounds liability for nuisance in the construction of an *opus manufactum*, a notion that has traditionally

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<sup>153</sup> R Zimmermann and P Simpson, “Liability among Neighbours” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (2000) at 630.

<sup>154</sup> *G A Estates Ltd* (n 67).

<sup>155</sup> *Ibid* at 1041, emphasis added.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid* at 1042, emphasis added.

been precisely linked to a special – stricter – regime of liability,<sup>158</sup> whereas it remains silent as to the scope of the possible strict liability. The defenders had presented as one of the grounds of their claim (statement 5) the fact that the pursuers had interfered with the course of the stream, arguing that this was the cause of the overflow and subsequent damage. In analysing this ground, Lord Coulsfield stated that

The purpose of that paragraph is, as I understand it, to plead a case of absolute liability founding on the decision in *Caledonian Railway Co v Greenock Corporation* on the view that, in the circumstances of this case, such liability may be enforced without proof of negligence, notwithstanding the decision in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*.<sup>159</sup>

It is possible, therefore, to argue that when his Lordship distinguished between the nuisance rule and the possible strict liability rule, the ground for the latter was precisely the rule from *Caledonian Rly Co*, as distinguished from the rule in *RHM Bakeries*, despite the fact that *Caledonian Rly Co* was not mentioned afterwards when laying down the liability rules.

Not too long after, a new case appeared where the pursuers partly founded their claim on the *Caledonian Rly Co* rule: the case of *Inverness Harbour Trs v British Railways Board*.<sup>160</sup> Its facts, however, were rather different from those in *Caledonian Rly Co*: the defenders built a railway viaduct over the river Ness, and during a state of high flow one of the viaduct piers was undermined as a result of scour, causing the collapse of the viaduct and subsequent damage to the pursuers' harbour structures. Apart from averments of negligence on the part of the defenders in the viaduct's maintenance, the pursuers argued that by tipping stones around the piers in the process of building it, the defenders created a *novum opus manufactum* that altered the flow of the river and created a danger of serious harm for which they were responsible. They invoked the application of the rule in *Caledonian Rly Co* which, in their view, "was a case of a *novum opus manufactum* which was not dissimilar to the present case".

Lord Kirkwood, however, dismissed the application of *Caledonian Rly Co*:

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<sup>158</sup> See the discussion in chapter 3 section 2.1.2.

<sup>159</sup> *GA Estates Ltd* (n 67) at 1040.

<sup>160</sup> *Inverness Harbour Trustees v British Railway Board* Unreported (26 February 1993).

In a case involving damage caused by a *novum opus manufactum*, other than a case where the facts are virtually identical to those in the *Caledonian Railway* case, I am satisfied that the basis of any liability on the part of the defender will be *culpa*.<sup>161</sup>

Thus, Lord Kirkwood defined the scope of the *Caledonian Rly Co* rule in an extremely restrictive way. Alteration of the course of a stream is not enough; the facts must be “virtually identical” to those in *Caledonian Rly Co*, and it is clear they were not in this case: the alteration of the course was effected in a different way, the phenomenon that ultimately triggered the accident was a different one, and the damage was caused by a different “agent” (not water itself, but the materials from the collapsed bridge). What is notable from the brief paragraph transcribed is, however, that he considered this rule not to be one of *culpa*.

Consequently, these two cases went no further than recognising the existence of the rule, without actually applying it: in the first case, its applicability was left to be determined after proof; whereas in the second case, it was regarded as not applicable at all. Accordingly, these cases lend a weaker support for the strict liability view of *Caledonian Rly Co* than the two cases decided before *RHM Bakeries*.<sup>162</sup>

### 3.2. The modern view of the *Caledonian Rly Co* case

It is in this context that a substantial challenge to the traditional strict liability view of the *Caledonian Rly Co* case was advanced. In his article entitled “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*”,<sup>163</sup> Gordon Cameron submitted not only that liability in the *Caledonian Rly Co* type of case is fault-based as in any nuisance case, but also that the damages award in the case of *Caledonian Rly Co* was itself based upon fault. The contention has found subsequent doctrinal support: while Gordon and Wortley assert that the strict nature of liability is now “not entirely clear” by reference to this argument,<sup>164</sup> Whitty concludes that Cameron’s research

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<sup>161</sup> Ibid.

<sup>162</sup> *Stirling v North of Scotland Hydro-Electric Board* (n 141) and *Plean Precast Ltd v National Coal Board* (n 106).

<sup>163</sup> G D L Cameron, “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*” (2000) 5 SLPQ 356.

<sup>164</sup> Gordon & Wortley, *Land Law* § 6-57.



“points strongly to the view that the *Caledonian Rly Co* case is not a true exception” to the general fault-based liability rule.<sup>165</sup> Consequently, it is necessary to evaluate this argument in order to determine whether we can still accept the existence of an exceptional strict liability rule in this type of case or whether instead it should be dealt with under the general nuisance rule.

It is possible to identify four independent reasons advanced by Cameron to support his argument: the authority cited in *Caledonian Rly Co* is seen now as fault-based; the defenders were indeed found negligent; the speeches do not conclusively support strict liability; and the defenders were also at fault in a different sense. Each reason is explained briefly below.

### 3.2.1. The decision in *Kerr* was based on fault

As has been mentioned above, the decision in *Caledonian Rly Co* was based upon the earlier decision in *Kerr*, and it is believed to have adopted and applied a strict liability view of the latter case.<sup>166</sup> In Cameron’s argument, however, this view is inconsistent with the modern House of Lord’s view of *Kerr* as fault-based, as advanced in *RHM Bakeries*:<sup>167</sup> if the real basis of liability in *Kerr* was fault, then it is problematic to justify the strict liability view of *Caledonian Rly Co* in its application of *Kerr*.<sup>168</sup>

### 3.2.2. The defenders were actually negligent

Secondly, Cameron highlights that the way in which the *Caledonian Rly Co* case was reported obscured the fact that the Lord Ordinary had indeed found negligence on the part of the defenders.<sup>169</sup> The main ground of the defenders’ appeal was *damnum fatale*, that is, they attacked causation. The fact that they failed and their liability was upheld creates the impression that liability was solely based on causation, but this was

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<sup>165</sup> Whitty, “Nuisance” (reissue) § 93.

<sup>166</sup> See p 201 above.

<sup>167</sup> *RHM Bakeries* (n 18) at 39 per Lord Fraser of Tullybelton.

<sup>168</sup> Cameron (n 163) at 360.

<sup>169</sup> *Ibid* at 361.

not the case. The remarks about the basis of liability were, in his view, “only secondary matters arising from the ‘contingency plan’ of the appellants”.<sup>170</sup>

### 3.2.3. The dicta does not necessarily support strict liability

Thirdly, the impression that liability was solely based upon causation would be further assisted, in his view, by some remarks made by the judges in their speeches that seemed to support strict liability, where in fact they did not necessarily do so. In a detailed analysis of each of the speeches, he finds some key elements which would actually point towards liability based in negligence: the references to the “deficiency” of the culvert to carry off the water of an extraordinary yet foreseeable rainfall, present in the dicta of the Lord Chancellor, Lord Shaw and Lord Wrenbury, are interpreted as setting out breach of a duty of care;<sup>171</sup> and the discussion by the Lord Chancellor of whether the defender was to be liable even for extraordinary events is seen as a discussion of the standard of care.<sup>172</sup>

### 3.2.4. The defenders were at fault apart from negligence: unlawfulness *per se*

Finally, Cameron submits that, besides being negligent, the defenders were at fault in a different way. Lord Shaw’s statement about the defenders not being entitled to perform the operations in the first place – reported only in the Appeal Cases<sup>173</sup> – is interpreted as a finding of a form of fault different from negligence: what he calls “unlawfulness *per se*”.<sup>174</sup> A similar view is attributed to Lord Wrenbury<sup>175</sup> and, to an extent, to the Lord Ordinary, though the view of the latter judge is linked to the rules of drainage of surface water.<sup>176</sup> Lord Shaw and Lord Wrenbury’s view of unlawfulness is considered to be close to a form of fault contemplated in the

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<sup>170</sup> Ibid at 362-363.

<sup>171</sup> Ibid at 366, 369 and 370.

<sup>172</sup> Ibid at 366.

<sup>173</sup> [1917] AC 556.

<sup>174</sup> Cameron (n 163) at 370.

<sup>175</sup> Ibid at 370 and 374.

<sup>176</sup> Ibid at 373-374.

distinction laid out in *Chalmers v Dixon*,<sup>177</sup> *Edinburgh Railway Access and Property Co v John Ritchie & Co*<sup>178</sup> and *Noble's Trs v Economic Forestry (Scotland) Ltd*.<sup>179</sup> performing operations of which the natural result is harm and where no amount of care can prevent its occurrence. This form of fault, in his view, is the one identified by Lord President Hope in *Kennedy v Glenbelle Ltd* as “conduct causing a special risk of abnormal damage”.<sup>180</sup> The decision was, therefore, “doubly” fault-based.

### 3.3. An alternative view

The argument presented by Cameron is difficult to challenge: he offers four premises each of which, independently, would justify his conclusion. A different reading is, however, proposed here. It is argued that it is still possible to recognise a strict liability rule, precisely for the fourth reason advanced by Cameron, except a different view of such reason is offered: the form of fault consisting of conduct causing a special risk of abnormal damage, considered in *Kennedy*, is not accurately described as a form of fault. The first three of Cameron's reasons are discussed before in order to argue that they are not fatal to the proposal here presented.

#### 3.3.1. *Caledonian Rly Co* adopted a strict liability view of *Kerr*

Cameron's first argument is built as follows: the strict liability view of *Caledonian Rly Co* is based upon its application of a strict liability view of *Kerr*. *Kerr* is now, according to *RHM Bakeries*, considered to have been based upon fault. Therefore, the strict liability view of *Caledonian Rly Co* is no longer justified.

It is irrefutable that Lord Fraser in *RHM Bakeries* did explain *Kerr* on the basis of fault, relying on dicta from both the Outer House and the Inner House decisions in the latter case.<sup>181</sup> One could, however, question whether he was justified in doing so: he recognised that there were dicta in the Inner House decision that seemed to

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<sup>177</sup> *Chalmers v Dixon* (1876) 3 R 461 at 464 per Lord-Justice Moncreiff.

<sup>178</sup> *Edinburgh Railway Access and Property Co v John Ritchie & Co* (1903) 5 F 299 at 302.

<sup>179</sup> *Noble's Trs* (n 67) at 664.

<sup>180</sup> Cameron (n 163) at 374-375.

<sup>181</sup> *RHM Bakeries* (n 18) at 39.

support a strict liability rule, and dismissed such dicta simply by saying that there were also dicta pointing in the opposite direction. In this context, the election of one over the other seems not to be entirely warranted. At best, if fault was indeed the basis of the decision, it was a case of implied or presumed fault, since it was not proved in the case.<sup>182</sup>

In any case, even if one is willing to accept Lord Fraser's explanation of *Kerr* as based on a finding (or presumption) of fault, this does not mean that the House of Lords in *Caledonian Rly Co* had such a view of *Kerr*. The dicta in *Caledonian Rly Co*, in fact, seem to indicate the contrary, and this was acknowledged by Lord Fraser in *RHM Bakeries*, when he conceded that *Caledonian Rly Co* approved from *Kerr* the dictum that seemed to apply strict liability.<sup>183</sup> One could, of course, argue that the court in *Caledonian Rly Co* applied the *wrong* view of *Kerr*, but it would still be the adopted view and the decision has not been overruled. Moreover, the House of Lords, having had the chance in *RHM Bakeries* to overrule *Caledonian Rly Co*, or at least to explain it in fault terms as it did with *Kerr* – especially since the court found in *Caledonian*, just like in *Kerr*, dicta pointing in both directions –, chose to do neither, allowing that it might remain in place as a possible, though restricted, exception.

### 3.3.2. The irrelevance of the defenders' negligence

In Cameron's view, the report of *Caledonian Rly Co* omits that the defenders were indeed found negligent, an aspect that was not discussed before the House of Lords. The discussion in this court was mainly concerned with the defence of *damnum fatale*, that is, with the requirement of causation, and not the requirement of fault, which had been satisfied earlier in the process.

It may well be that the defenders were indeed negligent and that the Lord Ordinary's decision was based in this circumstance, as it appears from his opinion.<sup>184</sup>

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<sup>182</sup> An analysis of these dicta is can be found in p 106 above.

<sup>183</sup> *RHM Bakeries* (n 18) at 42.

<sup>184</sup> See e.g. the paragraph transcribed by Cameron (n 163) at 373-374: "The defenders may have been entitled to improve their property by culverting the stream and raising the level of the park, but they could easily have done that, *if they had exercised reasonable care*, without danger to anybody. [...] *I doubt*

Fault-based liability is obviously always open for a pursuer to claim. But that would not preclude the court from recognising an equally applicable strict liability rule. The correct question, in other words, is not whether there was fault, but whether fault was required. For this question, the fact that there is a finding of negligence is, technically, irrelevant: strict liability is not liability *without* fault, but liability *regardless* of fault.<sup>185</sup> Therefore, what would truly answer this question is the determination of whether the House of Lords discussed the requirement of causation as the *sole* basis of liability and confirmed the damages award accordingly, or only as *one* of the requirements of liability in the assumption that the other requirements – especially fault – were already satisfied. And here is where the dicta seem to be inconclusive.

### 3.3.3. The dicta is not supportive of fault-based liability either

The suggestion that the dicta do not necessarily support strict liability is also advanced by Lord Fraser in *RHM Bakeries*: certain dicta in *Caledonian Rly Co* can be read as supporting strict liability, whereas other dicta seem to ground liability in *culpa*.<sup>186</sup> Cameron identifies two specific elements that point in the latter direction: the references to the deficiency of the culvert and the discussion of whether the defender was liable for extraordinary events. In his view, these elements refer respectively to a breach of the duty of care and to the standard of care, notions that belong to fault, particularly, to negligence.

Arguably, however, those elements can also be read as referring to causation and the determination of whether there was a *damnum fatale*, a view that is consistent with the fact that these two aspects were precisely the issues under discussion in the case. Deficiency, in this view, is not an indication of the defenders' negligence but an element of their causal contribution to the accident. The discussion about the defenders having to respond for extraordinary events, in turn, seeks to draw the line

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*whether the defenders ever considered what effect their interference with the stream and alteration of the levels was likely to have in very heavy floods*" (emphasis added).

<sup>185</sup> See p 21 above.

<sup>186</sup> *RHM Bakeries* (n 18) at 42.

between what is a *damnum fatale* and what is not, that is, whether the established causal link was broken by the rainfall.

### 3.3.4. “Unlawfulness *per se*” is not a form of fault

The last argument advanced by Cameron is interesting because it departs from the previous ones, based upon negligence, and proposes a different form of fault:

“unlawfulness *per se*”. He remarks that, according to certain dicta, the defenders were at fault, apart from negligence, merely for altering the course of the stream; they “acted unlawfully in altering the lie of the land so as to make the public highway the natural conduit for any overflow”.<sup>187</sup> The reasons why he considers this operation unlawful are twofold: it breached the limitations imposed on the right to drain surface water and it created a particular type of danger.

The first reason is based on the opinion of the Lord Ordinary (Dewar), who seems to have considered the defenders’ operation as an unreasonable increase of the pursuer’s burden to receive surface water given the position of his land.<sup>188</sup> The opinion is rather puzzling, since the water that reached the pursuer’s land was not, or at least not only, surface water: the harm was caused by the overflow of a stream, that is, water that flowed in a defined channel. The point was not revisited in the House of Lords’ decision, which focused on the alteration of this channel. Nevertheless, even if one accepts the surface water rule as the basis of the Lord Ordinary’s decision, it is not clear how this constitutes in itself a form of fault. It has been explained above that liability for drainage of surface water requires fault as a separate requirement from that of undue pressure of the right.<sup>189</sup> Arguably, the current position might have not been so clear at the time *Caledonian Rly Co* was decided. Yet from Lord Dewar’s very opinion it appears that the defender’s liability is based upon the fact that they did not exercise “reasonable care”,<sup>190</sup> terminology that points to negligence as the basis of liability. Therefore, though the defenders’ operations might have been unlawful – or

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<sup>187</sup> Cameron (n 163) at 373.

<sup>188</sup> Ibid at 373-374.

<sup>189</sup> See p 196 above.

<sup>190</sup> See n 184 above.

“wrongful”, in the sense discussed above<sup>191</sup> – in that they unduly pressed the right to drain surface water, that is not equivalent to a finding of fault.

The second and more compelling reason for the operation’s unlawfulness is considered to be closer to the opinions of Lords Shaw and Wrenbury: the defenders were not entitled to execute them in the first place because flood was foreseeable. Consequently, Cameron considers that, in altering the course of the stream, the operation can be described as one where no amount of care can prevent harm in the sense outlined by the line of cases led by *Chalmers v Dixon*,<sup>192</sup> which corresponds with the last category of fault contemplated by the Inner House in *Kennedy v Glenbelle Ltd*:<sup>193</sup> they created a special risk of abnormal damage.

There is considerable strength in this argument. The defenders undoubtedly created a significant danger, which called for the application of *Kerr*, and assuming that this danger was of a level that made it relevant in the sense of *Chalmers*, i.e. where due precautions would not prevent injury,<sup>194</sup> *Kennedy*’s reading of this type of operations would be that there is a different form of fault or, more precisely, implied fault.

Whitty warns that this is technically an “impure taxonomic category” compared to the other forms of fault from the *Kennedy* catalogue, in that it is determined by reference to the gravity of the harm rather than the mental element.<sup>195</sup> This thesis’ argument, however, goes further: this notion of implied fault is in reality a label for strict liability.<sup>196</sup> Cameron himself remarks that “[i]t may well be that this form of liability in Scots law does not differ significantly from the modern application of the rule in *Rylands* in English law, modified as it has been by *Cambridge Water Co v Eastern Counties Leather*”.<sup>197</sup> The *Cambridge Water Co*<sup>198</sup> case determined that liability based upon the strict liability rule in *Rylands v Fletcher*<sup>199</sup> was conditioned by

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<sup>191</sup> See section 2.3.1 above.

<sup>192</sup> *Chalmers* (n 177) at 464 per Lord Justice-Clerk Moncreiff.

<sup>193</sup> *Kennedy* (n 65) at 99 per Lord President Hope.

<sup>194</sup> See p 129 above.

<sup>195</sup> Whitty, “Nuisance” (reissue) § 93.

<sup>196</sup> See the full argument in chapter 3 section 3.

<sup>197</sup> Cameron (n 163) at 375, reference omitted.

<sup>198</sup> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

<sup>199</sup> *Rylands v Fletcher* (1868) LR 3 HL 330.

the requirement of foreseeability of harm. The fact that foreseeability of harm is required, however, does not turn a strict liability rule into a fault-based one.<sup>200</sup>

A different form of unlawfulness is advanced by Robbie, in a view that seems to go back to the traditional explanation of the rule. In discussing damages as a remedy for breach of common interest, and highlighting the “paradox” of having strict liability under the exceptional rule from *Caledonian Rly Co* and a fault-based liability rule for common interest, she regrets that “it is not sufficiently highlighted in the case law or commentary that interfering with the natural flow of a river is a wrong in itself (albeit under common interest)”,<sup>201</sup> referring to Cameron’s discussion of unlawfulness. It is not clear what the remark intends to suggest with regard to fault, but it must be noted, as it has been above,<sup>202</sup> that the case of *Caledonian Rly Co* was not one between riparian owners,<sup>203</sup> so it can hardly be said that the pursuer had common interest rights to enforce.

More generally, this contention might be coloured by the subject matter of the author’s work: she is concerned with common interest, and certainly any breach of common interest can be qualified as a “wrong”, for if this were not the case, it is difficult to see why the law would provide any remedy. But this does not mean that *all* remedies are available, particularly damages. If what is meant here is that, because the alteration of a watercourse is a wrong in itself, fault is not necessary – or, perhaps, fault is implied –, then any breach of common interest would be susceptible of the same analysis. But this is not the case under the main current position, which the author accepts (though not without hesitation): fault is required as a general rule.<sup>204</sup> The same is true in nuisance: even if it is a wrong that calls for the application of an interdict, damages claims require fault.

The view proposed here, therefore, seems to be close in substance with Cameron’s analysis of this issue, though he remains on the side of the orthodox view in considering that the creation of the relevant level of risk is a form of fault or, more

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<sup>200</sup> See p 22 above.

<sup>201</sup> Robbie (n 25) § 7.95.

<sup>202</sup> See above nn 35-36 and the accompanying text.

<sup>203</sup> See p 185 above.

<sup>204</sup> See p 188 above.



precisely, an implication of fault. The position here advanced challenges that notion, holding that this is simply a strict liability rule.

### 3.4. *Caledonian Rly Co* in the wider context of dangerous activities

The conclusion reached above leads inevitably to a further question: is the rule from *Caledonian Rly Co*, then, limited only to alteration of watercourses, as *RHM Bakeries* so strongly contends?

If one takes the view that the reason why the alteration of a watercourse deserves special treatment is that it creates a certain level of risk, in the sense of *Kennedy*'s "implied fault", then there is no reason to constrain its application strictly to this particular set of facts. However, this argues for both expanding and restricting the scope of application of the rule.

On the one hand, in the words of Zimmermann and Simpson, "if [...] the ratio underlying *Caledonian Railway* is sound it can hardly be confined to one specific situation".<sup>205</sup> And the ratio for the special treatment is not that there is something specific to alteration of watercourses that makes it wrong in the sense indicated by *Robbie*, i.e. a breach of common interest,<sup>206</sup> nor that the interference with nature is in itself deserving of a special treatment. The ratio is based upon risk. Consequently, any use of water – or, indeed, any use of property – that creates the relevant level of risk should be treated in the same way. The strict confinement of the rule in the terms outlined by *RHM Bakeries* is, in this sense, relaxed by *Kennedy*, expanding its application.

On the other hand, the rule should be applied only if the relevant level of risk, in the sense discussed in chapter 3, is reached. If it is not, then the fact that the specific operation was the alteration of a watercourse in itself should be irrelevant, and general fault rules should apply.

### 3.5. Subsequent case law

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<sup>205</sup> Zimmermann and Simpson (n 153) at 630.

<sup>206</sup> See p 215 above.

Since Cameron's research was published, there has been virtually no case that serves to test these conclusions. There is only one case where the facts resemble those of *Caledonian Rly Co*: the case of *Viewpoint Housing Association Ltd v City of Edinburgh Council*,<sup>207</sup> where a stream was culverted by the roads authority, and its insufficiency caused the flood of the pursuers' land. The pursuers' damages claim was founded both in negligence and nuisance, yet they later argued that a case based on strict liability would remain open if fault could not be proved. The Lord Ordinary (Emslie), however, had a different view: such a case was not open for the pursuers since the defenders had no fair notice of it. If the pursuers wanted to hold this "fallback" position, a minute of amendment would be required.<sup>208</sup> What seems to be implied is that strict liability was not excluded as a matter of principle, but only because it was not properly pleaded. Consequently, and in line with the previous post-*RHM Bakeries* cases of *G A Estates Ltd*<sup>209</sup> and *Inverness Harbour Trs*,<sup>210</sup> the court appears to have recognised the existence of the rule, but did not apply it in the case. Commenting on this case, Cameron reaffirmed his view of the *Caledonian Rly Co* case, arguing that its relevance for the *Viewpoint Housing* case ought to have been only the recognition of a duty of care on the part of a public body building or in occupation and control of works on watercourses.<sup>211</sup> But this leaves Lord Emslie's comments unexplained except for the implication that they were plainly mistaken given the fault-based liability view of *Caledonian Rly Co*.

### 3.6. Conclusion

In sum, despite recent doctrinal challenges, the liability rule in *Caledonian Rly Co* may be viewed as one of strict liability, not because it relies on an infringement of the

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<sup>207</sup> *Viewpoint Housing Association* (n 67).

<sup>208</sup> *Ibid* at § 22.

<sup>209</sup> *G A Estates Ltd* (n 67).

<sup>210</sup> *Inverness Harbour Trs* (n 160).

<sup>211</sup> G D L Cameron, "Interference with Natural Watercourses: Nuisance, Negligence and Strict Liability" (2008) 12 *EdinLR* 105 at 108.

rights of riparian owners, but because operations of this class create a specific level of danger that attracts this type of liability.

#### 4. CHAPTER CONCLUSIONS

In conclusion, the damages claims originating from disputes over uses of water largely reproduce the set of rules outlined and discussed in chapters 2 and 3 of this thesis, that is, liability rules provided for nuisance and damage caused by abnormally dangerous conduct.

First, it has been shown that, despite the varied categorisation of disputes over uses of water – as breach of common interest, nuisance, breach of the right to drain surface water, or simply “wrongs” – the treatment of these disputes has evolved towards convergence, not only with regard to their categorisation but also with regard to the applicable liability rule. Thus, these disputes are now consistently dealt within the nuisance framework, with the sole exception of disputes about drainage of surface water, which have remained a separate category so far. At the same time, all the categories have reached the same solution as to the requirement of fault for damages claims: fault must be averred and proved, according to the cases of *Thomson* in the context of breach of common interest; *RHM Bakeries* and *Kennedy* in the case of nuisance; and *Noble’s Trustees* for damage caused by drainage of surface water. In this particular sense, it does not make a practical difference to resort to one or the other category – when more than one is available – as none will relieve the pursuer from the requirement of fault. It might make a difference, for the case of surface water, if the scope of *Kennedy* is restricted to nuisance only.

Second, the evaluation developed here suggests that we can still consider the rule applicable to the alteration of a watercourse as a strict liability rule. It is possible to raise some questions about Cameron’s view on *Caledonian Rly Co* being based on fault, but there is a section of his argument that seems unquestionable: the facts of *Caledonian Rly Co* would most likely fit what today is qualified as an implied fault under the authority of *Kennedy*, namely conduct causing a special risk of abnormal damage. Yet in the view held in this thesis, this implied fault is, indeed, a disguised strict liability rule. The necessary consequence is that the strict liability rule from

*Caledonian Rly Co* is not confined to the particular set of facts that were present in the case, but actually to any case where the relevant level of risk is created. *Caledonian Rly Co* is simply an instance of the application of this rule.



# 5 Withdrawal of Support

## 1. INTRODUCTION

The second group of disputes between neighbours that receive special treatment concerns withdrawal of support. This group, however, unlike the previous group – disputes over uses of water, discussed in chapter 4 – does not conform to the general framework outlined in previous chapters.

Damages claims for harm caused by withdrawal of support are governed by three sets of rules. The first set is called here the “basic rules” of support, namely a set of rules that are applicable specifically and exclusively to this type of dispute. The second set is that applicable to liability by virtue of non-delegable duties of care, a more general category that finds in support disputes one of its main fields of application. Finally, the law of nuisance is held to be equally applicable to liability derived from support disputes.

The main argument presented in this chapter is that damages claims for withdrawal of support should be subject to the same general legal framework that applies to other disputes between neighbours. A survey of these three sets of rules will show, however, that they are not. The basic rules of liability for withdrawal of support contain a distinction between liability rules that is no longer justified (section 2). Rules on non-delegable duties provide an apparent but rather unsatisfactory solution (section 3). As a consequence, the approach advocated here is to subject support disputes to the wider framework set in chapters 2 for nuisance and chapter 3 for abnormally dangerous conduct (section 4).

## 2. THE BASIC RULES

The basic rules that govern the so-called right to support vary according to the interaction of two elements. On the one hand, they vary depending on the type of property being supported, that is, whether it is land or a building – or a section of a building – and, in the first case, whether that land has, in turn, buildings or structures erected on its surface. On the other hand, they vary according to the relative physical

position of the property being supported with regard to the object providing such support, namely whether what is provided or withdrawn is subjacent or adjacent support. From the interaction of these two types of elements we obtain a set of six factual settings. The respective sets of rules for each of these factual settings result, in turn, from the combination of legal and policy considerations (section 2.1).

It will be noted that, from the perspective of the fault requirement for damages claims, the first four factual settings are covered by a strict liability rule, whereas in the remaining two, liability is fault-based. Nowadays, however, the distinction based upon these criteria does not seem justified, for two reasons. First, the diverse legal nature of the right to support in the different contexts does not sufficiently justify the diversity in the existing rules. Secondly, the economic reason that underpinned the strict liability rule for the first four settings has lost its relevance in the current economic and legal scenario. The element that might justify a strict liability rule today, i.e. risk, does not provide a reason to discriminate between the different types of properties supported, but most likely one to discriminate between different levels of risk. A better approach, therefore, is to impose common rules of liability for all cases of withdrawal of support when the right to support exists, regardless of the type of property or its relative situation (section 2.2).

## 2.1. Six factual settings

The law as it stands today can be summarised as follows:

FACTUAL SETTING	NATURE OF THE RIGHT	CORRELATIVE OBLIGATION	LIABILITY RULE
Subjacent support of unencumbered land	Traditional view: natural right, incident to ownership. Modern view: delictual protection of property.	Negative obligation.	Strict liability.
Adjacent support of unencumbered land	Ditto.	Ditto.	Ditto.
Subjacent support of encumbered land	Traditional view: acquired right; servitude. Modern view: same nature as support of unencumbered land.	Ditto.	Ditto.
Adjacent support of encumbered land	Ditto.	Ditto.	Ditto.
Subjacent support of (sections of) buildings	Common interest.	Negative and positive obligation.	Fault-based liability.
Adjacent support of buildings	Common gable built on boundary: common interest	Ditto.	Ditto.
	Separate gables & common gable built on one side of boundary: servitude	Negative obligation.	

### 2.1.1. Subjacent support of unencumbered land

Withdrawal of subjacent support of land is not discussed by the Institutional writers or other earlier commentators, and there is almost no case law until the nineteenth century,<sup>1</sup> when it became a critical issue due to the great development of coal mining activities. Most of the authority upon which the principles of the common law of support are based belongs, indeed, to the second half of the nineteenth century and the resolution of controversies between mineral proprietors and surface proprietors, when the extraction activities developed by the former caused the surface of the land to subside. In the present day, the common law principles have declined in importance, not only due to the contraction of coal mining activity but mainly as a consequence of extensive statutory regulation enacted during the twentieth century.<sup>2</sup> Nevertheless, as pointed out by Reid, the principles remained relevant for mining

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<sup>1</sup> Rankine, *Land-Ownership* 488.

<sup>2</sup> Coal Industry Nationalisation Act 1946; Coal-Mining (Subsidence) Act 1957; Coal Mining Subsidence Act 1991; Coal Industry Act 1994.



activities outside the scope of the statutory regulation as well as for different activities, such as tunnelling.<sup>3</sup>

The question of whether the surface owner has a right to have his land supported by the land below has not been controversial when the land is kept in its “natural state”, that is, when no buildings or structures are erected on the surface. Slightly more – though perhaps not sufficiently – controversial has been the question about legal nature of this “right”. The traditional view is that the right to support is a natural right, incident to ownership.<sup>4</sup> Scottish legal literature and case law rarely go further than formulating general statements to the same effect,<sup>5</sup> with the exception of Reid, who adopts a clear position on the point,<sup>6</sup> and Rennie, who remains cautious.<sup>7</sup> These general statements about it being “a natural right”, however, do not really tell us anything about its nature. Instead they tell us, as pointed out by Reid,<sup>8</sup> about the way in which this right is born, i.e. its origin: it does not have to be acquired; it exists by operation of the law, whenever there is ownership of land. More illustrative of the actual nature of the right are some of the – mostly English – cases that are frequently cited as authority for the natural right “nature” of support: in both *Humphries v Brogden*<sup>9</sup> and *Bonomi v Backhouse*,<sup>10</sup> the right was regarded as a restriction on the neighbour’s use of his own property, based on the principle of *sic utere tuo non laedas alienum*. This is consistent with what Reid considers to be the nature of the right to

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<sup>3</sup> Reid, *Property* § 252. One of the last cases of withdrawal of subjacent support of land decided by courts was, in fact, concerned with a railway tunnel: *Rogano Ltd v British Railways Board* 1979 SC 297.

<sup>4</sup> Rankine, *Land-Ownership* 489; D R Stewart, *A Treatise on the Law of Mines, Quarries, and Minerals in Scotland* (1894) 166; J Carmont, “Support” in J L Wark (ed), *Encyclopedia of the Laws of Scotland*, vol 14 (1932) § 678; and Walker, *Delict* 946, among others.

<sup>5</sup> A more developed discussion can be found in South African literature. See, e.g., J R L Milton, “Lateral Support of Land: a Natural Right of Property” (1965) 82 SALJ 459; J R L Milton, “The Law of Neighbours in South Africa” [1969] *Acta Juridica* 123 at 199-200; J D van der Vyver, “Expropriation, Rights, Entitlements and Surface Support of Land” 105 SALJ 1; and A J van der Walt, *The Law of Neighbours* (2010) 96-113. This discussion in the South African context is limited only to adjacent support, for horizontal division of ownership is not possible in this jurisdiction. Subjacent support has here a different nature: it is a servitude.

<sup>6</sup> Reid, *Property* §§ 254-258.

<sup>7</sup> R Rennie, *Minerals and the Law of Scotland* (2001) 60-63. Additionally, Rennie mentions Gordon’s position on the subject, yet the source cited in this connection does not appear to be directly in point: it refers to the chapter on water in W M Gordon, *Scottish Land Law* (2nd edn, 1999).

<sup>8</sup> Reid, *Property* § 254.

<sup>9</sup> *Humphries v Brogden* (1850) 12 QB 739 at 744.

<sup>10</sup> *Bonomi v Backhouse* (1858) EB&E 622 at 637 per Whightman J, and 639 per Coleridge J. The decision was reversed by the Exchequer Chamber, yet only on the point about the moment in which the claim arises; and this last decision was confirmed in *Backhouse v Bonomi* (1861) 9 HL Cas 503.

support: it is simply “one aspect of the general rule that one must not injure the property of one’s neighbour”, an obligation founded in delict. This position, in his view, is expressed in most Scottish cases,<sup>11</sup> unlike the other two alternative explanations of the right as common interest and implied servitude.<sup>12</sup> The entitlement to support is, in other words, ancillary to the right of ownership (or possibly that of a tenant under a lease<sup>13</sup>). Infringement of the correlative obligation on the part of neighbours to provide support triggers delictual liability. In this sense, it is equivalent to the right not to be affected by a nuisance. Scots cases of withdrawal of support over the last fifty years suggest that these are not just seen as equivalent, but that withdrawal of support *is* indeed a form of nuisance,<sup>14</sup> and English authors tend to agree in that withdrawal of support is actionable in nuisance.<sup>15</sup> Nevertheless, the term “right to support” will continue to be used here as shorthand for this form of delictual protection of ownership, that is, the right of the surface owner to be compensated when his property has been damaged as a consequence of withdrawal of support caused, in turn, by the operations performed by lower proprietor. This protection includes the right to interdict these operations before harm has occurred, provided that the requirements of an interdict are fulfilled. This chapter, however, focuses on liability in damages once harm has occurred, for the object of this thesis is the requirement of fault in damages claims.

The obligation that correlates with this right is construed only in negative terms: the landowner can only claim compensation for damage caused by the lower proprietor’s active interference with the existent support. He cannot claim compensation for the lower proprietor’s failure to take positive steps to provide support.<sup>16</sup>

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<sup>11</sup> Reid, *Property* § 256. In the same sense, though in a rather brief statement, J M Halliday, *Conveyancing Law and Practice*, vol 2 (I J S Talman ed, 2nd edn, 1997) § 34-05 explains that damages are based on the *sic utere* principle.

<sup>12</sup> Reid, *Property* §§ 255 and 257.

<sup>13</sup> Reid, *Property* § 258.

<sup>14</sup> See p 254 below.

<sup>15</sup> See, e.g., R Megarry and W Wade, *The Law of Real Property* (C Harpum, S Bridge and M Dixon eds, 8th edn, 2012) § 27-027; and K Gray and S F Gray, *Elements of Land Law* (5th edn, 2009) § 1.2.24 n 1.

<sup>16</sup> *Rogano Ltd* (n 3) at 302; Reid, *Property* § 253; Gordon & Wortley, *Land Law* § 5-83.

It is generally accepted nowadays that liability for withdrawing support is strict,<sup>17</sup> according to what is considered the leading modern authority: *Angus v National Coal Board*.<sup>18</sup> This, however, does not seem always to have been the case. The early treatises on the law of delict by Guthrie Smith and Glegg discussed the rights between surface owners and minerals owners in the context of negligent use of property.<sup>19</sup> Glegg expressly stated that the minerals owner would be liable if harm resulted “from want of usual and reasonable precautions, or due care and diligence”.<sup>20</sup> Most of the early case law points in the same direction: cases such as *Bald’s Trustees v Alloa Colliery Ltd*,<sup>21</sup> *Hamilton v Turner*,<sup>22</sup> and *Mid and East Calder Gas-Light Co v Oakbank*<sup>23</sup> clearly relied on fault, whereas other cases such as *Howie v Campbell*<sup>24</sup> and *Muirhead v Tennant*<sup>25</sup> based liability on the notion of “improper working”.<sup>26</sup>

Possibly the first indication of a change towards strict liability can be found in a case where the contract between the parties included a clause excluding liability and the court considered that, despite the exclusion, liability for improper working of land was still open for the pursuer.<sup>27</sup> The implication seems to be that the liability that was effectively excluded by the clause must have been strict. Other cases thereafter seemed to suggest that liability would be strict, but in these cases there were no damages claims, so no compensation was awarded based on this possibly strict liability rule.<sup>28</sup> The case of *Aitken Trustees v Rawyards Colliery Ltd*,<sup>29</sup> however, was indeed a case where damages were claimed and awarded without any discussion of

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<sup>17</sup> T B Smith, *Short Commentary* 527 n 4; Walker, *Delict* 947; Reid, *Property* § 253; Rennie (n 7) 82; H L MacQueen and Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* (13th edn, 2012) § 34.21.

<sup>18</sup> *Angus v National Coal Board* 1955 SC 175.

<sup>19</sup> Guthrie Smith, *Reparation* ch XI, s I is entitled “Injuries caused by the negligent use of real property”; Glegg, *Reparation* ch XII, s II considers mining issues as a natural use of property, subject to the duty to take precautions.

<sup>20</sup> Glegg, *Reparation* 264.

<sup>21</sup> *Bald’s Trustees v Alloa Colliery Ltd* (1854) 16 D 870 at 875 per Lord President Colonsay.

<sup>22</sup> *Hamilton v Turner* (1867) 5 M 1086 at 1095 per Lord President Inglis.

<sup>23</sup> *Mid and East Calder Gas-Light Co v Oakbank Oil Co Ltd* (1891) 18 R 788 at 792 per Lord M’Laren.

<sup>24</sup> *Howie v Campbell* (1852) 14 D 377 at 378.

<sup>25</sup> *Muirhead v Tennant* (1854) 16 D 1106 at 1108 per Lord President Colonsay.

<sup>26</sup> In some of these cases, land was actually encumbered with buildings. But, as will be explained, the right is said to operate in the same way and is subject to the same rules as in the case of bare land: see p 232 below.

<sup>27</sup> *Buchanan v Andrew* (1873) 11 M (HL) 13 at 20 per Lord Chancellor Selborne.

<sup>28</sup> *Daniel Stewart’s Hospital Governors v Waddell* (1890) 17 R 1077 at 1082 per Lord Young; and *Bank of Scotland v Stewart* (1891) 18 R 957 at 968 per Lord Adam.

<sup>29</sup> *Aitken’s Trustees v Raywards Colliery Co Ltd* (1894) 22 R 201.

fault. This seems to be the decision that induced Glegg's change of opinion: by the second edition of his treatise, the reference to "want of usual and reasonable precautions, or due care and negligence" disappeared from the text, and although he kept the reference to *Hamilton v Turner*, he added to the same note the case of *Aitken Trs*. By the turn of the century, the scales seemed to be inclined towards strict liability until the matter was settled conclusively by the mid-twentieth century in the case of *Angus v National Coal Board*, where liability was unanimously and explicitly held to be strict.<sup>30</sup>

It is possible to identify in the early cases a growing concern on the part of the courts for the fact that mineral owners, in order to obtain the full benefit of the minerals, could just simply bring down the land and the houses<sup>31</sup> where surface owners lived, especially since according to some methods utilised widely at the time and considered "proper" modes of working, it was impossible or very difficult to obtain all the minerals without causing this harmful result.<sup>32</sup> This might have been at the root of the development of the strict liability rule: the consideration that mineral owners were developing a highly lucrative activity without assuming the risks involved. It was not possible to make their fault-based liability effective because their conduct was, according to the activity standards at the time, considered appropriate.<sup>33</sup> Consequently, courts reacted imposing strict liability as the price to pay, a price that ultimately was not seen as too high considering the level of profits that the activity yielded.

Nevertheless, the case of *Angus*, which contains the modern reaffirmation of the strict liability rule, did not seem to ground the rule in this sort of consideration. The dicta suggest that the justification of such liability was simply that support was considered to be an "incident of property". The owner has the right to have his land

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<sup>30</sup> *Angus* (n 18) at 181 per Lord Justice-Clerk Thomson, and 182 per Lords Mackintosh and Birnam.

<sup>31</sup> The reference to houses here, where unencumbered land is discussed, is explained by the fact that, when the right to support exists, the same principles apply in both contexts: see p 232 below.

<sup>32</sup> See *Hamilton v Turner* (n 22) at 1100 per Lord Ardmillan; *Buchanan v Andrew* (n 27) at 20 per Lord Chancellor Selborne; *Neill's Trustees v William Dixon Ltd* (1880) 7 R 741 at 748 per Lord Gifford; and *Daniel Stewart's Hospital Governors v Waddell* (n 28) at 1082 per Lord Young.

<sup>33</sup> See F Werro and V V Palmer (eds), *The Boundaries of Strict Liability in European Tort Law* (2004) 222-223.

supported, and liability arises simply because such right has been interfered with.<sup>34</sup> This reasoning is, at best, unconvincing, and the point is revisited below.<sup>35</sup>

Moreover, *Angus* itself was not a case of support in the sense discussed here but a personal injuries claim. Damages were claimed by the widow of an agricultural worker whose death was caused by the subsidence of the field in which he was working. Consequently, damages were not sought to compensate harm to land or buildings there erected and, for this reason, the case was not seen as one based on the right to support.<sup>36</sup> Compensation was refused and the remarks on the nature of the liability rule were, strictly speaking, *obiter dicta*. As the leading authority, therefore, it rests on rather weak grounds.

### 2.1.2. Adjacent support of unencumbered land

In contrast with subjacent support, which was not considered by the Institutional writers, adjacent support of land was indeed considered by Bell:

Although a proprietor may, to the very verge of his property, dig his ground and remove the earth (§ 965), he is not entitled to do any direct injury to his neighbour; or to take away the support of his property; or to occasion reasonable apprehensions of danger; [...]<sup>37</sup>

The authority cited by Bell, however, is not specific to this type of support but mostly to support in the context of tenements, except for the case of *Robertson v Strang*,<sup>38</sup> where liability was imposed without much discussion on the basis of such liability.

Nevertheless, since the early development of the principles applicable to subjacent support it was considered that they were equally applicable to adjacent support,<sup>39</sup> and authors have echoed consistently such statements.<sup>40</sup> This is consistent with Scots law's recognition of ownership of "separate tenements":<sup>41</sup> property in land

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<sup>34</sup> *Angus* (n 18) at 181 per Lord Justice-Clerk Thomson, and 182 per Lord Mackintosh.

<sup>35</sup> See p 241 below.

<sup>36</sup> *Angus* (n 18) at 181 per Lord Justice-Clerk Thomson, and 182 per Lord Mackintosh.

<sup>37</sup> Bell, *Principles* § 970.

<sup>38</sup> *Robertson v Strang* (1825) 4 S 5.

<sup>39</sup> *Caledonian Railway Co v Sprot* (1856) 2 Macq 449 at 452 per Lord Chancellor Cranworth.

<sup>40</sup> From Rankine, *Land-Ownership* 489 to Gordon & Wortley, *Land Law* § 5-82.

<sup>41</sup> Reid, *Property* § 207.

admits not only vertical but horizontal division; thus proprietors of, for instance, the minerals that lie underneath my land, are my neighbours in the same sense as proprietors of land adjacent. Consequently, the nature of the right and the extent of its correlative obligation are considered to be the same in the case of subjacent and adjacent support, and liability is equally strict.<sup>42</sup>

### 2.1.3. Subjacent support of land encumbered with buildings

The traditional view of the right to support from subjacent strata when buildings or structures have been erected on the surface of land is that this right is not natural but acquired: the surface proprietor must have granted, expressly or impliedly, such right.<sup>43</sup> As to the nature of the right, the most common explanation was that it is a servitude,<sup>44</sup> although in most cases this nature was presented in a false opposition, that is, the right was seen as a servitude – actually pointing out its nature – as opposed to a natural right – which refers to the right’s origin. With regard to its content, this servitude is considered to be similar to the Roman law servitude *oneris ferendi*,<sup>45</sup> and is positive in character.<sup>46</sup>

The main debates that developed both doctrinally and judicially were concerned with the circumstances in which a grant of such servitude could be said to have occurred, particularly an implied grant, and the matter was seen mainly as one of contractual interpretation. The basic principle was enunciated in *Caledonian Rly Co v Sprot*:

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<sup>42</sup> Although it is possible to identify here, just as in the case of subjacent support, early cases that seem to have been solved by reference to fault: see, e.g., *Campbell’s Trustees v Henderson* (1884) 11 R 520 at 525 per Lord Young.

<sup>43</sup> Rankine, *Land-Ownership* 496; Stewart (n 4) 170; Carmont (n 4) § 705; Smith, *Short Commentary* 527.

<sup>44</sup> Rankine, *Land-Ownership* 496; Stewart (n 4) 170-171; Carmont (n 4) § 705; Walker, *Delict* 948; Halliday (n 11) § 34-05; N R Whitty, “Reasonable Neighbourhood: the Province and Analysis of Private Nuisance in Scots law. Part II” (1983) 28 JLSS 5 at 15.

<sup>45</sup> Rankine, *Land-Ownership* 496. See p 237 below for more details on the servitude *oneris ferendi*.

<sup>46</sup> Ibid, though the positive character of this “servitude” is mentioned explicitly only since the second edition of his treatise: J Rankine, *The Law of Land-Ownership in Scotland. A Treatise on the Rights and Burdens Incident to the Ownership of Lands and other Heritages in Scotland* (2nd edn, 1884) 409; the positive nature also mentioned in Stewart (n 4) 180 and Carmont (n 4) § 706.

[A]ll which a grantor can reasonably be considered to grant, or warrant, is such a measure of support subjacent and adjacent as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant is made.<sup>47</sup>

When buildings existed already at the time of the grant, the issue was not seen as problematic,<sup>48</sup> except in cases where these buildings were replaced for new ones.<sup>49</sup> The main controversy referred to buildings erected after the grant, and the key question to determine if the owner was entitled to have them supported was whether the buildings were covered by the purpose of the contract,<sup>50</sup> or more generally, whether they were in the contemplation of the parties.<sup>51</sup> Yet in some cases, courts went further: they considered that landowners were entitled to make reasonable use of their land, which included building on the surface, and this did not cause the right to support to be lost.<sup>52</sup> It is not clear whether this can be simply considered as the operation of the natural right to support or, on the contrary, it is a generally implied (acquired) right to support for such reasonable erections.<sup>53</sup>

Later cases, however, seemed to imply that in fact the right to support land encumbered with buildings was generally afforded as a matter of common law, and the parties could renounce it.<sup>54</sup> Based on these cases and those cited above,<sup>55</sup> Reid put forward the modern view on the origin and nature of the right to support land encumbered with buildings, namely that Scots law does not actually distinguish, as English law does,<sup>56</sup> between this land and land in its natural state. Moreover, the restriction on the right to support where there has been excessive building, although

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<sup>47</sup> *Caledonian Railway Co v Sprot* (n 39) at 451 per Lord Chancellor Cranworth.

<sup>48</sup> Like, for instance, in the case of *Gibson v Farie* 1918 1 SLT 404.

<sup>49</sup> E.g. *Aitken's Trs* (n 29); *Barr v Baird & Co* (1904) 6 F 524.

<sup>50</sup> Rankine, *Land-Ownership* 501, like in the case of *Aitken's Trs* (n 29) where the land was acquired for the purpose of building.

<sup>51</sup> Stewart (n 4) 178, like in the case of *Hamilton v Turner* (n 22) where building the houses was indeed an obligation contemplated in the lease.

<sup>52</sup> *Hamilton v Turner* (n 22) at 1095 per Lord President Inglis, 1098 per Lord Deas, and 1100 per Lord Ardmillan; *Bain v Duke of Hamilton* (1867) 6 M 1; *Neill's Trs* (n 32) at 745 per Lord Ormidale.

<sup>53</sup> Gordon & Wortley, *Land Law* § 5-91. Carmont (n 4) § 710 was inclined to the latter position, which in his view only applied when the defender had granted the surface and retained the minerals.

<sup>54</sup> *Barr v Baird & Co* (n 49) at 529 per Lord President Kinross; and *Dryburgh v Fife Coal Co Ltd* (1905) 7 F 1083 at 1098 per Lord Kyllachy.

<sup>55</sup> See n 52.

<sup>56</sup> Despite the traditional assertion of the identity of both laws in, e.g., *Caledonian Railway Co v Sprot* (n 39) at 461 per Lord Chancellor Cranworth; *Buchanan v Andrew* (n 27) at 17 per Lord Chancellor Selborne; and *William Dixon Ltd v White* (1883) 10 R (HL) 45 at 46 per Lord Blackburn.

often mentioned, does not seem actually to have been applied.<sup>57</sup> Consequently, both the origin of the right and its nature must remain the same as in the case of bare land: the right is natural, i.e. it arises together with ownership, and its primary significance is as a source of delictual liability. From the few support cases of the last half century, however, the only one that discussed the nature and origin of this support, *Rogano Ltd v British Railways Board*, does not lend support for such a view, since it considered that the right of support for built-upon land was not a natural right, but had the nature of a servitude that had to be acquired by express or implied grant, and possibly by prescription.<sup>58</sup> The point does not seem to be resolved in the literature,<sup>59</sup> but case law's broad construction of the notion of implied grant suggests that, perhaps, it only disguises the recognition of a general natural right to support, in the line of Reid's view.

Less prominently than the debates just outlined, the possibility of acquiring the right by prescription has also been discussed. Rankine was initially inclined against this notion,<sup>60</sup> yet by the second edition of his treatise, and apparently because he recognised the nature of the right as a positive servitude following *Dalton v Angus*,<sup>61</sup> he accepted the possibility, since all positive servitudes could be acquired in this way.<sup>62</sup> Positive servitudes can, nowadays, be acquired by prescription according to the express provision contained in s 3 of the Prescription and Limitation (Scotland) Act 1973.<sup>63</sup> This view, of course, relies on the concept of support as a servitude and makes sense only in the context of support as an acquired right. Accordingly, the view has been contested more recently, based on the fact that damages for withdrawal of support can be claimed under the doctrine of nuisance, which would render acquisition by prescription unnecessary.<sup>64</sup>

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<sup>57</sup> Reid, *Property* § 260.

<sup>58</sup> *Rogano Ltd* (n 3) at 301.

<sup>59</sup> A summary of the positions in this debate can be found in Rennie (n 7) 63-68.

<sup>60</sup> In the first edition of his treatise: J Rankine, *The Law of Land-Ownership in Scotland. A Treatise on the Rights and Burdens Incident to the Ownership of Lands and other Heritages in Scotland* (1879) 380-382.

<sup>61</sup> *Dalton v Angus* (1881) 6 App Cas 740.

<sup>62</sup> Rankine, *Land-Ownership* (n 46) 411-413. The same view is held by Stewart (n 4) 180-181 and Carmont (n 4) § 713.

<sup>63</sup> The required possession period is 20 years: s 3(2) Prescription and Limitation (Scotland) Act 1973.

<sup>64</sup> Whitty (n 44) at 16, questioning the authority of *Dalton v Angus* (n 61) in Scots law.



In any case, the difference between the natural right to subjacent support of unencumbered land and the acquired right to subjacent support of built-upon land was said to lie only in their origin. The extent and consequences of such rights were considered to be the same,<sup>65</sup> so in this sense, all the principles about subjacent support to unencumbered land would apply equally in this context. This is the reason why most of the authority cited to justify the principles for support of bare land actually consists of cases where land was built upon. Similarly, the right to support in regard to land with buildings erected on the surface is of the same nature and origin as that for land in its natural state. Consequently, the obligation correlative to the right to support of land encumbered with buildings is negative only, and liability is strict, according to the current leading authority.

#### 2.1.4. Adjacent support of land encumbered with buildings

The principles applicable to this type of support result from the combination of two assimilations: on the one hand, the assimilation between subjacent and adjacent support indicated in factual setting 2.1.2, and, on the other, the assimilation between support of bare land and that of land encumbered with buildings indicated in factual setting 2.1.3.

The consequence is that, once again, the obligation is negative, and liability for its breach, strict.

#### 2.1.5. Subjacent support of (sections of) buildings

If support of land was of primary importance during the nineteenth and early twentieth centuries, support within tenements took over this position to become the main source of support disputes from the second half of the twentieth century onwards. In urban settings, buildings divided by floors and flats are commonplace.<sup>66</sup>

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<sup>65</sup> Rankine, *Land-Ownership* 496; Stewart (n 4) 171; Carmont (n 4) § 707. The authority cited these authors in support this contention were the cases of *Bonomi v Backhouse* (n 10); *Caledonian Railway Co v Sprot* (n 39); and *Dalton v Angus* (n 61).

<sup>66</sup> This has been the case in Scotland since as early as the sixteenth century: K G C Reid, “The Law of the Tenement. New Thoughts on Old Law” (1983) 28 *JLSS* 472 at 472.

This particular setting can be the source of several issues between neighbours, one of which is, more specifically, the treatment of possible harmful consequences caused to flats located in upper floors by the operations carried out by an occupier of a lower floor. This and other issues between tenement neighbours are addressed by the law of the tenement, which is today statutorily regulated by the Tenements (Scotland) Act 2004 (henceforth, T(S)A).

The idea that lower flats must bear the weight of and serve as the support structure for upper flats was recognised by Stair,<sup>67</sup> Erskine,<sup>68</sup> Hume,<sup>69</sup> and Bell.<sup>70</sup> Bell, in fact, gave its title to what has been identified as the basis of the obligation to provide subjacent support in the context of tenements: the doctrine of common interest.<sup>71</sup>

The doctrine of common interest has already been mentioned in chapter 4, mostly with regard to its application in the context of disputes over uses of water.<sup>72</sup> Since the doctrine of common interest has now been abolished for the purposes of the law of the tenement, as we will see,<sup>73</sup> no detailed account of it is offered here.<sup>74</sup> It is enough to say that, in general, the doctrine determined the rights and obligations of tenement owners with regard to the sections of the tenement that they did not own individually.<sup>75</sup> More particularly, in relation to support, common interest gave upper proprietors the right to have their properties supported by lower proprietors'.<sup>76</sup> This right to support, however, was different to that which exists in the previous four factual settings, in two fundamental aspects.

First, the obligation that correlated to the support based upon common interest was not construed only in negative terms, but also had positive content: the upper proprietor not only could require the lower proprietor to refrain from doing anything

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<sup>67</sup> Stair, *Institutions* 2.7.6.

<sup>68</sup> Erskine, *Institute* 2.9.10.

<sup>69</sup> Hume, *Lectures* 226.

<sup>70</sup> Bell, *Principles* § 1086.

<sup>71</sup> The origin in this context is, however, traced back to Stair: K G C Reid, "Common Interest. A Reassessment" (1983) 28 JLSS 428 at 428.

<sup>72</sup> See chapter 4 section 2.1.

<sup>73</sup> See p 235 below.

<sup>74</sup> For a traditional description see Rankine, *Land-Ownership* ch XXXIII, largely intact since the first edition. For a more contemporary view, see Reid, "Common Interest. A Reassessment" (n 71).

<sup>75</sup> See Reid, *Property* § 232.

<sup>76</sup> *Ibid* § 271.

that could interfere with the existent support – and be compensated if he did – but could also demand that he take positive steps in order to provide such support, that is, to keep his property in a condition to maintain adequate support.<sup>77</sup>

Secondly, liability for breaching these obligations was fault-based. The point was not clear and, indeed, available authority seemed to point to strict liability,<sup>78</sup> until the decision in *Thomson v St Cuthbert's Cooperative Association Ltd*.<sup>79</sup> The pursuer in this case based her claim on two alternative grounds: common interest and fault.<sup>80</sup> With regard to the first ground, she argued, *inter alia*, that requiring fault in this context would deprive the doctrine of common interest of any relevant content, as it would leave the matter to be entirely regulated by the law of negligence. Lord Mackintosh, however, rejected this view, explaining that

[t]he doctrine of common interest creates a special area of community within which mutual rights and duties are owed, and makes into neighbours to whom duties are owed parties who otherwise under the general law of negligence as now developed in, for example the case of *Donoghue v Stevenson*, would not be treated as such.<sup>81</sup>

According to this dictum, the doctrine of common interest seems to dispose of the question of duty of care in negligence. It is difficult to see, however, how the general law of negligence would provide a different answer: given the features of these disputes, arising in the context of close and circumscribed physical proximity and where physical harm is most likely foreseeable, it is likely that a duty of care would be identified in such context in any event. In this sense, it seems that in fact the doctrine of common interest does not add anything to the general rules of liability for damage to property, and Reid suggested, some years later, that the case was actually wrongly decided.<sup>82</sup>

The *Thomson* case was one of breach of the positive obligation of support. Two subsequent Sheriff Court cases clarified that the fault-based liability rule applies also

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<sup>77</sup> Reid, *Property* § 233.

<sup>78</sup> Reid, “Common Interest. A Reassessment” (n 71) at 434.

<sup>79</sup> *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380.

<sup>80</sup> *Ibid* at 381.

<sup>81</sup> *Ibid* at 397-398, reference omitted.

<sup>82</sup> Reid, “Common Interest. A Reassessment” (n 71) at 434-435.

to the breach of the negative obligation: the cases of *Kerr v McGreevy*<sup>83</sup> and *Doran v Smith*.<sup>84</sup> In both cases, the pursuers argued that although there was no “absolute duty” to provide support, there was a duty not to interfere with support, and liability for the breach of this duty did not require fault.<sup>85</sup> The Sheriffs, however, rejected this view. In *Kerr v McGreevy*, the decision was based on the general principle that liability does not arise *ex dominio* (as stated in *Campbell v Kennedy*<sup>86</sup>); and on the fact that the decision in *Thomson* did not make an exception for the negative obligation, identifying a “duty to take reasonable care” as corresponding to the right to object to operations that might endanger support.<sup>87</sup> In *Doran v Smith*, in turn, the Sheriff simply could not find a “valid distinction” between the negative and the positive obligation, making the rule from the *Thomson* case extend to the former.<sup>88</sup>

This was the picture at the time the Scottish Law Commission issued its *Report on the Law of the Tenement*,<sup>89</sup> which would subsequently lead to the drafting and enactment of the T(S)A.

The T(S)A expressly abolished the doctrine of common interest, at least insofar as it applied within the tenement (s 7), yet it is submitted that the act simply restated this common law doctrine in statutory form.<sup>90</sup>

The content of the positive obligation is regulated in T(S)A, s 8, entitled “Duty to maintain so as to provide support and shelter etc.”:

(1) Subject to subsection (2) the owner of any part of a tenement building, being a part that provides, or is intended to provide, support or shelter to any other part, shall maintain the supporting or sheltering part so as to ensure that it provides support or shelter.

According to s 8(2), however, this duty to maintain is not due “if it would not be reasonable to do so, having regard to all the circumstances”, which will happen when the building is no longer worth repairing.<sup>91</sup>

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<sup>83</sup> *Kerr v McGreevy* 1970 SLT (Sh Ct) 7.

<sup>84</sup> *Doran v Smith* 1971 SLT (Sh Ct) 46.

<sup>85</sup> *Kerr v McGreevy* (n 83) at 7; *Doran v Smith* (n 84) at 47.

<sup>86</sup> *Campbell v Kennedy* (1864) 3 M 121.

<sup>87</sup> *Kerr v McGreevy* (n 83) at 8.

<sup>88</sup> *Doran v Smith* (n 84) at 48.

<sup>89</sup> Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162, 1998).

<sup>90</sup> T(S)A, explanatory note to s 7.

The negative obligation, in turn, is regulated in T(S)A, s 9, as a “Prohibition on interference with support or shelter” by virtue of which

- (1) No owner or occupier of any part of a tenement shall be entitled to do anything in relation to that part which would, or would be reasonably likely to, impair to a material extent—
- (a) the support or shelter provided to any part of the tenement building; [...]

No reference is made in either provision to the liability rule applicable if the obligations there stated are breached and damages are claimed for such a breach. The reference to reasonableness in T(S)A, s 8, is linked to the condition of the building and whether it is still “worth saving”, not to the standard of care required for the maintenance. The *Report*, in turn, only discussed briefly the liability rule applicable to the infringement of the positive obligation, recommending the preservation of the common law fault-based liability rule as stated in the case of *Thomson* without the need for an express provision,<sup>92</sup> but nothing is said about the rule applicable to the breach of the negative obligation.

There are two roads that can be followed here, and both lead to the same conclusion. One road is to accept that the common law rules on liability based upon the doctrine of common interest have survived the T(S)A, despite the fact that the T(S)A abolished the doctrine and, in restating it, did not include these liability rules. This position is supported, at least with regard to the positive obligation, by the remarks made in the *Report*. The other road is to acknowledge that the T(S)A simply does not consider special liability rules for the breach of the obligations of support and, therefore, one must look at the general liability rules for damage to property. Through both roads, we arrive at the same conclusion: liability is still fault-based, as it was before the T(S)A.

#### 2.1.6. Adjacent support of buildings

When two separate buildings share a wall, insofar as this wall is built precisely on the line of the boundary, the ownership of the wall lies on each proprietor up to the mid-

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<sup>91</sup> T(S)A, explanatory note to s 8(2).

<sup>92</sup> Scottish Law Commission (n 89) § 7.9.

point. The part that is not owned, however, is subject to reciprocal common interest.<sup>93</sup> The doctrine, for this context, was not abolished by T(S)A, s 7, and consequently remains in force. By virtue of this common interest, each proprietor is subject to both a positive and a negative obligation of support: they must, on the one hand, maintain their respective sides of the wall and, on the other hand, avoid doing anything that might endanger its stability.<sup>94</sup> The cases that provide authority for this proposition,<sup>95</sup> however, were not damages actions so they do not contain clear indications of the liability rule applicable to the breach of such obligations, and the literature similarly does not give a clear answer. If the law of common interest did not provide for strict liability in the context of tenements, it is difficult to see why it would do so in this context. There is no authority suggesting a departure from the general rules of liability.

Now, where the wall is built on one side of the boundary, or where there are two separate walls that are in touch with each other, there is wide agreement as to the absence of a natural right to adjacent support. Bell recognised the owner's right to prevent his neighbour from resting his building on the former's wall,<sup>96</sup> and authors up to the present day have consistently maintained that a servitude of support can be acquired by grant, express or implied.<sup>97</sup> The possibility of acquiring this servitude by prescription has been more controversial.<sup>98</sup>

Two Roman law servitudes of support are recognised by Scots law. The first is the servitude *oneris ferendi*, namely the "right in the dominant proprietor to rest the weight of his house on the servient proprietor's wall or pillar".<sup>99</sup> The second is the servitude *tigni immitendi*, which binds the servient proprietor "to permit the dominant proprietor to insert a beam or joist in the wall of the servient tenement".<sup>100</sup> It can be noted that whereas the first servitude can be properly characterised as one of support,

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<sup>93</sup> Reid, *Property* § 223.

<sup>94</sup> Ibid § 225.

<sup>95</sup> *Cochran's Trustees v Caledonian Rly Co* (1898) 25 R 572, and more recently *Trades House of Glasgow v Ferguson* 1979 SLT 187.

<sup>96</sup> Bell, *Principles* § 941.1.

<sup>97</sup> Rankine, *Land-Ownership* 510; Carmont (n 4) § 719; Reid, *Property* § 484; Gordon & Wortley, *Land Law* § 5-106.

<sup>98</sup> Rankine, *Land-Ownership* 510; Carmont (n 4) § 720; Reid, *Property* § 484.

<sup>99</sup> G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 2012) 754.

<sup>100</sup> Ibid 1087.

the second is probably better described as a right to encroach.<sup>101</sup> Consequently, only the first will be considered here.

This servitude of support is of a positive character:<sup>102</sup> it allows a use of the servient property by the dominant proprietor which would not be permissible in the absence of the servitude, in this case, the use of neighbour's wall to rest the weight of the building, and as a logical consequence, it imposes the negative obligation not to interfere with it.<sup>103</sup>

As to the imposition of a positive obligation to maintain the wall that provides the support, the Institutional writers seemed divided: Stair acknowledged a division in opinions but he was inclined to the negative;<sup>104</sup> whereas Bankton identified *oneris ferendi* as the only servitude making exception to the general principle that servitudes do not impose positive obligations on the servient owner.<sup>105</sup> Erskine, in turn, deemed this to be the principle "in the common case", but no reference is made to any exceptional case,<sup>106</sup> while Bell considered that this particular servitude did, in fact, impose the obligation to maintain the wall, although he acknowledged that "an opposite doctrine [was] sometimes laid down",<sup>107</sup> and later points out that this obligation "with us [...] requires a special contract".<sup>108</sup>

Modern literature seems to agree that the servitude *oneris ferendi* is not, as it was in Roman law, an exception to the rule *servitus in faciendo consistere nequit*, although some authors express doubts.<sup>109</sup> The doubts are worth considering, for the two cases cited as authority for the contention were not, in fact, cases where adjacent support of buildings had been withdrawn. In *Robertson v Scottish Union and National Insurance Co*, a street was carried over another street through an arched viaduct and bridge, and

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<sup>101</sup> T A Ross, *Servitudes in the Law of Scotland. Principles, Sources and Influences which have affected the Law* (1933) 69.

<sup>102</sup> Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000) § 12.7; D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) § 3.73.

<sup>103</sup> Cusine and Paisley (n 102) § 3.73.

<sup>104</sup> Stair, *Institutions* 2.7.6.

<sup>105</sup> Bankton, *Institute* 2.7.7.

<sup>106</sup> Erskine, *Institute* 2.9.1.

<sup>107</sup> Bell, *Principles* § 984.

<sup>108</sup> *Ibid* § 1003.

<sup>109</sup> Reid, *Property* § 484 considers the point as "doubtful" but is still inclined to the negative; whereas Gordon (n 7) § 24-17 does not manifest such doubts; and Cusine and Paisley (n 102) § 3.73 actually affirm both answers, though later they reaffirm the negative.

the question discussed was whether the maintenance of the arches was an obligation of the owners of the *solum* where they stood or an obligation of the public authority in charge of the streets. The court decided that, since the principles of accession did not operate in the case, the owners of the *solum* were subject only to a servitude of support, of the nature of *oneris ferendi*, that did not impose on them the obligation to maintain the arches.<sup>110</sup> The case of *Rogano Ltd v British Railways Board*, in turn, was a case of withdrawal of subjacent support of land encumbered with buildings, and the court, in identifying the nature of support in these cases as a servitude, limited its content to the negative obligation based on what the Institutional writers had said about the servitude of support.<sup>111</sup> Consequently, the reference to *oneris ferendi* in both cases – explicit in the first one, implicit in the second one – was not to the precise servitude envisaged by Roman law and adopted in Scotland. This sheds light on the real incidence of the servitude *oneris ferendi* in its strict meaning: there is actually no precise authority on the point because this is not the usual way in which terraced or semi-detached houses are built. The common practice is to use common gables,<sup>112</sup> so the importance of the servitude seems to be rather marginal.<sup>113</sup> In any event, in the absence of direct authority supporting the imposition of a positive obligation, and given the rather wide agreement in the literature, it is unlikely that courts faced with a dispute of this character would recognise such an obligation.

With regard to the rule of liability applicable to the breach of the servitude, the picture is not much clearer due to the lack of authority, and authors in general do not discuss the point.<sup>114</sup> Rankine gave the impression that liability in this case would be strict, by stating that outside the scope of the servitude, liability is a matter of negligence.<sup>115</sup> Gordon, however, states more generally that the breach of a servitude allows a damages claim “where there has been fault”.<sup>116</sup> The case cited by Gordon as

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<sup>110</sup> *Robertson v Scottish Union and National Insurance Co* 1943 SC 427 at 439 per Lord Justice-Clerk Cooper, and 453 per Lord Wark.

<sup>111</sup> *Rogano Ltd* (n 3) 302.

<sup>112</sup> Reid, *Property* § 218.

<sup>113</sup> The reason for its existence in Scotland is most likely historical: the system of urban servitudes was adopted as a whole from Roman law. Ross (n 101) 58.

<sup>114</sup> Reid, *Property* § 482 states generally that damages are available when a servitude is breached; while Cusine and Paisley (n 102) do not refer to damages.

<sup>115</sup> Rankine, *Land-Ownership* 510.

<sup>116</sup> Gordon (n 7) § 24-78.



authority for this proposition, though asserting indeed the requirement of fault for damages in the case of an “extended use of a servitude right”,<sup>117</sup> was not a case of breach of servitude: what was being discussed was the right to drain and the corresponding duty to receive surface water. In any case, and again in the absence of any direct authority, the assumption must be that the general rules are applicable and, therefore, liability is fault-based.

## 2.2. Questioning the difference

It has been seen that four out of the six factual settings described above are covered by a strict liability rule, that is, subjacent and adjacent support of bare land and subjacent and adjacent support of land encumbered with buildings, whereas in the remaining two, i.e. subjacent and adjacent support of (sections of) buildings, liability is fault-based. It is submitted here that this distinction is not sufficiently justified, neither by the diverse legal nature that the right to support has in each context, nor by the policy considerations that underlie such rules. It is suggested that a better ground for distinction is that between the general liability rule applicable to nuisance, discussed in chapter 2, and the exceptional liability rule applicable to abnormally dangerous conduct, discussed in chapter 3.

### 2.2.1. Diverse legal nature, not necessarily diverse legal rule

As explained in section 2.1, the nature of the so-called right to support has been explained as delictual protection of ownership, as a servitude, or as based upon common interest, depending on the factual setting. So, intuitively, one could take these different explanations of its nature as a justification for the diversity of liability rules.

However, on the traditional view of support for built-upon land, this contention does not hold, for its nature as a servitude would be shared with adjacent support of buildings in the case of separate walls (*oneris ferendi*) and, as discussed above, in the

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<sup>117</sup> *Nobles Trustee's v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664.

first of these factual settings, liability is strict, whereas in the second, liability is fault based.

The point highlights the lack of proper consideration of support for land encumbered with buildings as a servitude. For in the best case, it would be a servitude with a particular rule of liability. But in recognising that the only difference between support for land in its natural state and support for land covered with structures is their origin (natural as opposed to acquired right), the alleged servitude of support becomes quite a peculiar servitude that does not “behave” like one, but is actually assimilated to what is seen simply as delictual protection of property, especially since the restriction on the right to support in cases of excessive building, which could be seen as a parallel to, or even a manifestation of, the dominant owner’s duty to exercise the servitude *civilter*, does not seem to have been applied.<sup>118</sup>

Now, if we disregard the servitude theory and consider that the nature is the same in support of both bare land and built-upon land, that is, that the right is nothing more than delictual protection of property, we are able to draw a line between these cases, subject to a strict liability rule, and those based on common interest and servitude, i.e. support of buildings, subject to a fault-based liability rule. But this is not enough to justify a strict liability rule in the first case, and the reason is rather obvious: protection of property through delict does not necessarily translate into strict liability, and the best example in the Scottish context is, of course, nuisance. If nuisance enjoys the same status as withdrawal of support from the perspective of its nature, then why do we have in the first case a strict liability rule, and in the second case a fault-based liability rule? First, we must remember that before 1985, there was authority supporting a strict liability view of nuisance,<sup>119</sup> so the strict liability rule for withdrawal of support made sense in such context. Secondly, and more importantly, there were policy considerations at the root of the development of the strict liability rule for withdrawal of support.

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<sup>118</sup> See p 230 above.

<sup>119</sup> See section 4.1 below.

### 2.2.2. Diverse policy considerations, different liability rules... but not as they stand today

The evolution of the liability rules traced in section 2.1 shows a curious result: the current basic rules applicable to all these factual settings are generally clear, yet in most cases the starting point seems to have been the opposite. Withdrawal of support of land, with or without structures built upon the surface, attracts strict liability, but this rule was settled with certainty only by the mid-twentieth century. Withdrawal of support of buildings, in turn, gives rise to liability only upon proof of fault, yet it is not clear, at least in the context of subjacent support, that this was always the way in which the doctrine of common interest was understood to operate, and clarification was achieved, again, by the mid-twentieth century.

In the case of support of land, what seems to have justified the migration to a strict liability rule was the protection of surface owners against mineral owners who would try to obtain the greatest possible benefit from their works, removing every last vestige of the minerals even if that would result in the destruction of houses built upon the surface.<sup>120</sup> The justification was mainly economic: the party obtaining considerable profit should also assume the cost of the activity. That justification was clearly absent in the context of support of buildings. But nowadays, this concern seems to have disappeared. The reasons, then, to subject withdrawal of support in tenements to a fault-based liability rule can be noted from the case of *Thomson*<sup>121</sup> and from the *Report on the Law of the Tenement*:<sup>122</sup> there simply seemed to be no reason, in the opinion of the court and, later, of the Commissioners, to depart from the general rules of liability in this case. Contemporary cases of withdrawal of support are caused mainly by construction<sup>123</sup> and demolition<sup>124</sup> operations, activities that are subject to administrative regulations and that do not seem to create the economic asymmetries created formerly by mining activities.

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<sup>120</sup> See p 227 above.

<sup>121</sup> *Thomson v St Cuthbert's Cooperative Association Ltd* (n 79) esp Lord Mackintosh's dictum at 395-396.

<sup>122</sup> Scottish Law Commission, *Report on the Law of the Tenement* (n 89) § 7.9.

<sup>123</sup> E.g. *Lord Advocate v Reo Stakis Organisation Ltd* 1981 SC 104; *Borders Regional Council v Roxburgh District Council* 1989 SLT 837.

<sup>124</sup> *Morris Amusements Ltd v Glasgow City Council* 2009 SLT 697; [2009] CSOH 84.

### 2.2.3. The suggestion

In a context where the economic asymmetries are no longer a relevant concern, what now emerges as the most convincing reason to justify the strict liability rule is the potential extensive damage to property and bodily integrity that interfering with support could entail, even to the point of destruction or death.

However, if this risk serves as the justification for a strict liability rule in the context of support of land, several questions are left unanswered. First, it is difficult to see why this does not extend to the context of support of buildings, where damage can be equally extensive. There seems to be no good reason to discriminate between a house that loses support and is rendered inhabitable because the neighbour dug a hole to set the foundations of his own house, from a flat that loses support and is rendered equally inhabitable because the neighbour from the lower floor removed a load-bearing wall to create an open-plan layout. Secondly, it is also not clear why the rule should be applicable only to the breach of the negative obligation if an omission can equally create or perpetuate a significant dangerous situation. Finally, if risk is nowadays the only convincing reason that justifies a strict liability rule in the context of support of land, the application of the rule to *all* cases does not discriminate adequately between operations that actually have such harmful potential and those which do not.

The suggestion is, therefore, that the more consistent approach would be to deal with support issues under the more general framework set out in chapters 2 and 3, subjecting them to a strict liability rule when the defender's conduct actually meets the requirements to be characterised as abnormally dangerous, just as any other conduct with similar harmful potential, and when it does not, to leave their regulation to the general fault-based liability rule for nuisance, regardless of the type of property.

## 2.3. Conclusion

The current basic liability rules applicable to withdrawal of support distinguish between the different types of property supported and their relative physical position in order to determine the basis of such liability. It is arguable that this distinction is not adequately justified in the present context: the differing legal nature of the right to support in the different contexts does not provide a sound foundation for the distinction and the policy considerations that drove the development of the strict liability rule are no longer relevant. Consequently, the better approach is to deal with damages claims for withdrawal of support just like any other damages claim in the context of neighbourhood, reserving a strict liability rule only for withdrawal of support that is the consequence of abnormally dangerous conduct.

## 3. AN APPARENT SOLUTION: NON-DELEGABLE DUTIES

In the present day, landowners rarely engage personally in the execution of operations that can endanger support of neighbouring properties. In the normal case, they hire a competent professional in order to plan and execute such operations; they entrust the operations to an independent contractor. Consequently, most of the support disputes that are discussed before courts nowadays are not concerned with the application of the basic rules outlined above, which determine the liability of the landowner for his own acts and omissions, but actually with the application of the rules that determine the landowner's liability for the acts of his independent contractor. The general trend has been to hold the landowner strictly liable by virtue of a "non-delegable duty", an exception to the general rule whereby the employer is not liable for the negligence of his independent contractor.

The recognition of a non-delegable duty in this context creates in practice a uniform rule of strict liability for all support disputes. This could be seen as a solution for the unjustified distinction identified in the basic rules, and one that is precisely based on risk, so there is no need for a change of approach in the sense suggested (section 3.1). This is, however, not a satisfactory solution: not only is the solution contingent, but also rests on uncertain grounds and can produce results that might be

inconsistent with the treatment of dangerous conduct proposed in this thesis (section 3.2).

### 3.1. Operation of non-delegable duties in support disputes: a uniform strict liability rule

As discussed in chapter 3, employers are not liable for injuries caused by the negligence of their independent contractors.<sup>125</sup> In the context of withdrawal of support, however, there is wide agreement about the existence of an exception to this general rule: when the landowner engages in operations that endanger support, he has a non-delegable duty whereby he is bound to make sure that damage does not occur. This is, indeed, one of the earliest identified cases of a non-delegable duty,<sup>126</sup> and Scottish courts have generally recognised the authority of the English cases of *Bower v Peate*<sup>127</sup> and *Dalton v Angus*<sup>128</sup> as the source of this duty. It has also been remarked in chapter 3 that the standard position in both English and Scots law is that when this non-delegable duty operates, the employer's liability is strict.<sup>129</sup>

In the particular case of support disputes, Scottish courts have relied on two lines of justification for the imposition of liability by virtue of the operation of a non-delegable duty: one that is based upon the dangerous nature of the operations that result in withdrawal of support, and one that is based upon the particular nature of the duty to support.

The first line of justification finds its authority in the two abovementioned English cases, *Bower v Peate*<sup>130</sup> and *Dalton v Angus*,<sup>131</sup> which were both cases of withdrawal of adjacent support of land encumbered with buildings. In the first of these cases, Cockburn CJ explained that

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<sup>125</sup> See p 135 above.

<sup>126</sup> P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (2010) 122.

<sup>127</sup> *Bower v Peate* (1876) 1 QBD 321.

<sup>128</sup> *Dalton v Angus* (n 61).

<sup>129</sup> See 136 above.

<sup>130</sup> *Bower v Peate* (n 127).

<sup>131</sup> *Dalton v Angus* (n 61).

a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else [...] to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.<sup>132</sup>

This dictum found approval by the House of Lords in the second of the cases,<sup>133</sup> although the wording of the ruling is slightly different:

When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions.<sup>134</sup>

The explanation traditionally given to this justification is one of distribution of risks: the operations are executed by the contractor for the benefit of the landowner, so the latter should assume the associated costs, not the former.<sup>135</sup>

This is the type of justification that has been relied upon in most of the modern support cases: *Kerr v McGreevy*,<sup>136</sup> *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd*,<sup>137</sup> *Baxter v Pritchard*,<sup>138</sup> *Hamilton v Wahla*,<sup>139</sup> and *Crolla v Hussain*,<sup>140</sup> which were all cases of withdrawal of subjacent support in the context of a tenement; *Borders Regional Council v Roxburgh District Council*,<sup>141</sup> a case of withdrawal of adjacent support of land

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<sup>132</sup> *Bower v Peate* (n 127) at 326-327.

<sup>133</sup> *Dalton v Angus* (n 61) at 829 per Lord Blackburn.

<sup>134</sup> *Ibid* at 831-832 per Lord Watson.

<sup>135</sup> P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) 333.

<sup>136</sup> *Kerr v McGreevy* (n 83) at 7.

<sup>137</sup> *Duncan's Hotel (Glasgow) Ltd v J & A Ferguson Ltd* 1974 SC 191 at 196 citing *Bower v Peate* (n 127), *Dalton v Angus* (n 61), and other English and Scottish nuisance cases.

<sup>138</sup> *Baxter v Pritchard* 1992 SCLR 780, citing *Dalton v Angus* (n 61), and *Borders Regional Council* (n 123).

<sup>139</sup> *Hamilton v Wahla* 1999 Rep LR 118 at § 20-14, though the reasoning here is different: by instructing dangerous operations, the landowner incurred the implied fault identified by *Kennedy v Glenbelle Ltd* 1996 SC 95, yet the result is said to be consistent with *Duncan's Hotel* (n 137).

<sup>140</sup> *Crolla v Hussain* 2008 SLT (Sh Ct) 145 at §§ 24-26, relying mainly in *Dalton v Angus* (n 61), *Borders Regional Council* (n 123), and other cases that decided disputes of a different nature, such as *Noble's Trs* (n 117), and *G A Estates Ltd v Caviapen Trustees (No 1)* 1993 SLT 1037.

<sup>141</sup> *Borders Regional Council* (n 123) at 839, citing expressly Lord Watson's dictum in *Dalton v Angus* (n 61) at 831-832 and concluding that the pursuer's averments were not enough to bring the case under the rule.

encumbered with buildings; and *Morris Amusements Ltd v Glasgow City Council*,<sup>142</sup> a case of withdrawal of adjacent support of a building.

The risk-based justification for non-delegable duties, however, has not been exempt from criticism. There is, in England, a perceived inconsistency between the imposition of strict liability by virtue of a non-delegable duty and the denial of a general strict liability rule for extra-hazardous activities.<sup>143</sup> Moreover, it is not clear what kind of danger justifies the imposition of a non-delegable duty. This can be noted from a comparison of the dicta quoted above: while *Bower* seems to point to the source of the danger, regardless of whether it can be avoided, *Dalton* appears to take this last circumstance into account, by confining liability to the case where the works are “necessarily attended with risk”, that is, when they are dangerous even if properly conducted. The leading case that imposed a non-delegable duty based upon danger, although not a support case, *Honeywill & Stein Ltd v Larkin Bros (London’s Commercial Photographers) Ltd*, regarded the origin of the danger as the relevant element: the operation had to be dangerous “in its intrinsic” nature, “inherently dangerous”, and it did not cease to be so just because, if carefully conducted, damage could be avoided.<sup>144</sup> More recently, however, the doctrine was characterised, in the case of *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*, as “so unsatisfactory that its application should be kept as narrow as possible”, confining it only to “activities that are exceptionally dangerous whatever precautions are taken”.<sup>145</sup>

In Scotland, the lack of clarity of the concept of “extra-hazardous” or “inherently dangerous” activity has indeed been pointed out in some of the cases listed above,<sup>146</sup> but even in those cases a non-delegable duty was recognised, so the courts seem to have considered that operations causing withdrawal of support

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<sup>142</sup> *Morris Amusement Ltd* (n 124) at §§ 43-45.

<sup>143</sup> R Stevens, “Non-Delegable Duties and Vicarious Liability” in J W Neyers, E Chamberlain and S G A Pitel (eds), *Emerging Issues in Tort Law* (2007) at 344; R F V Heuston and R A Buckley (eds), *Salmond & Heuston on the Law of Torts* (21st revised edn, 1996) at 465. For the progressive qualification of the *Rylands* rule and denial of a general strict liability rule, see *Read v J Lyons & Co Ltd* [1947] AC 156; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264; and more recently *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1; [2003] UKHL 61.

<sup>144</sup> *Honeywill & Stein Ltd v Larkin Bros (London’s Commercial Photographers) Ltd* [1934] 1 KB 191 at 200-201.

<sup>145</sup> *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2009] QB 725; [2008] EWCA Civ 1257 at § 78.

<sup>146</sup> *Duncan’s Hotel* (n 137) at 196; *Crolla v Hussain* (n 140) at § 26; *Morris Amusement Ltd* (n 124) at § 44.



somehow fit the category. The most recent case concerning non-delegable duties, *Esso Petroleum Co Ltd v Scottish Ministers*, highlighted once again, and with some detail, the problematical nature of the notion of “inherently hazardous operation”.<sup>147</sup> The case was not one of support, yet in discussing non-delegable duties in general, it considers that even in the case of support, the justification is danger-based.<sup>148</sup>

The second line of justification adopted by Scots courts for the imposition of a non-delegable duty in support disputes is based upon the particular characterisation of the right to support and its corresponding duty. This rationale was adopted in only one case, yet it is the single Inner House case that dealt with the issue of non-delegable duties in the context of support: the case of *Stewart v Malik*,<sup>149</sup> where damages were claimed for withdrawal of subjacent support in a tenement. This case reacted to the Outer House judgment in *Southesk Trust Co Ltd v Angus Council*,<sup>150</sup> a case of pollution of water, which questioned the existence of the exception in Scots law. After giving account of the history of the reception of the exception<sup>151</sup> and concluding that there had been “a long tradition of [its] acceptance”,<sup>152</sup> Lord President Hamilton in *Stewart* submitted that it was not necessary in the case to discuss whether this acceptance was well founded, precisely because the case at issue was one of support. After explaining that, according to the law of the tenement,

[f]ailure to support does not of itself, without proof of negligence or nuisance, give rise to liability in reparation (*Thomson v St Cuthbert's Co-operative Association Ltd*) but the obligation of support includes an obligation not to carry out operations on one's property which endangers support to other parts of the building[.]<sup>153</sup>

he concluded that

In Scotland the law of tenement [...] casts on the “servient” proprietor a positive duty in carrying out works which may affect support to avoid endangering the “dominant” property.

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<sup>147</sup> *Esso Petroleum Co Ltd v Scottish Ministers* 2016 SCLR 539; [2016] CSOH 15 at §§ 16-21.

<sup>148</sup> *Ibid* at § 19.

<sup>149</sup> *Stewart v Malik* 2009 SC 265; [2009] CSIH 5.

<sup>150</sup> *Southesk Trust Co Ltd & Elsieck Farms Ltd v Angus Council* [2006] CSOH 6.

<sup>151</sup> *Stewart v Malik* (n 149) at §§ 10-19.

<sup>152</sup> *Ibid* at § 22.

<sup>153</sup> *Ibid* at § 25.

That duty, which is personal to him, cannot, in my view, be elided by the instruction of an independent contractor.<sup>154</sup>

Consequently Lord Hamilton derived, from the duty to support's positive and personal nature, its non-delegable nature.

This understanding of the justification of the non-delegable duty in the context of support is in line with the subsequent Supreme Court judgment in the English case of *Woodland v Essex CC*.<sup>155</sup> In this case, Lord Sumption recognised two categories of non-delegable duties: those arising from the dangerous nature of the operations,<sup>156</sup> and those arising from a duty imposed by the common law on the defendant

which has three critical characteristics. First, it arises not from the negligent character or the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant.<sup>157</sup>

The non-delegable duty that arises in support disputes was located by Lord Sumption within the second category, even though he recognised that it might have been explained before in terms of the first category. In his view, the antecedent relationship between the parties was that of neighbourhood, from which the positive duty derives, duty that is personal to the landowner in his capacity as occupier of the land.<sup>158</sup> The point is not developed further, however, for the case was not one of support. It can be noted that Lord Sumption's analysis is largely coincident with Lord Hamilton's characterisation of the duty to support in Scots law, except that in the latter the first element is not explicit.

What can be concluded is that, despite the fact that there is no agreement about the adequate justification for the imposition of a non-delegable duty in the context of support disputes, there is agreement about the fact of its application. Most of the cases that have applied it are concerned with subjacent support in tenements, but there are reasons to believe that the rule is equally applicable in the other factual

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<sup>154</sup> Ibid at § 26.

<sup>155</sup> *Woodland v Essex CC* [2014] AC 537; [2013] UKSC 66.

<sup>156</sup> Ibid at § 6.

<sup>157</sup> Ibid at § 7.

<sup>158</sup> Ibid at § 9.

settings. The first reason is, rather obviously, the fact that it has been applied in at least two other settings: adjacent support of built-upon land and adjacent support of buildings, as indicated above in the list of cases that adopted the risk-based justification.<sup>159</sup> The second is that, as explained above, when the right to support is found in the context of built-upon land, it operates in the same way as it would in bare land and, further, there is no relevant distinction between the rules applicable to subjacent support and to adjacent support.<sup>160</sup> Accordingly, if the non-delegable duty is applicable in the context of adjacent support of land encumbered with buildings, then it should apply equally for subjacent support of such land, as well as for those cases where there are no buildings erected on the surface of the land. In any event, when discussing the non-delegable duties, the cases speak generally of the right to support, without restricting the application to a particular context.

If this conclusion is correct, the consequence is that, in practice, there is a uniform strict liability rule applicable to landowners for withdrawing support of neighbouring property, and a strict liability rule that is almost in every case based upon the dangerous nature of the operations instructed by the defender. Most of the cases of support in the last 50 years mention expressly that operations were, in fact, executed by independent contractors. In the remaining cases, the operations date back to over a century,<sup>161</sup> or it is simply not specified who executed the works.<sup>162</sup>

As a consequence, the suggestion advanced in the previous section is not necessary: there is no need for a change of approach, because in practice the approach is already different. This is, however, not a satisfactory solution.

### 3.2. Objections to the solution.

The uniform and mostly risk-based strict liability that arises in practice in support disputes by the operation of non-delegable duties is not a satisfactory solution for three reasons.

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<sup>159</sup> See p 246 above.

<sup>160</sup> See pp 228 and 232 above.

<sup>161</sup> *Rogano Ltd* (n 3).

<sup>162</sup> *Doran v Smith* (n 84) and *Macnab v Mcdevitt* 1971 SLT (Sh Ct) 41.

### 3.2.1. Risk-based strict liability is contingent

The first and more evident reason is that, even though this risk-based strict liability rule has been applied in a rather uniform pattern, it might not *necessarily* be so. Its application is contingent on the actual employment of independent contractors in any given case. But not only is it possible for the landowner to actually engage himself in the operations that result in the withdrawal of support, instead of hiring a competent contractor (for whatever reason he might find compelling), but it is also possible that the landowner *is* a competent professional himself. In these cases, damages claims are subject to the basic rules of support, without any consideration of the actual level of risk that they might create.

### 3.2.2. Danger justification: uncertain grounds

A second line of objections is linked to the results of the application of a non-delegable duty, in contrast with the results achieved by the application of the framework proposed in chapters 2 and 3. These results vary according to which justification one adopts.

It has been explained above that the justification of the imposition of a non-delegable duty based in danger is problematic because the boundaries of the type and level of danger required are by no means clear.<sup>163</sup> A survey of the cases shows that, when operating on the basis of this line of justification, neither English nor Scottish courts are consistent in requiring that danger must be at the level that cannot be controlled by the adoption of proper precautions.<sup>164</sup> This stands in contrast with the treatment proposed in chapter 3 for abnormally dangerous conduct: it will not be characterised as such unless the risk created by it cannot be adequately controlled through reasonable precautions.<sup>165</sup> The scope of application of the non-delegable

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<sup>163</sup> See p 247 above.

<sup>164</sup> In Scotland, contrast e.g. *Morris Amusement Ltd* (n 124) § 44 with the more recent *Esso Petroleum Co Ltd* (n 147) § 23.

<sup>165</sup> See chapter 3 section 4.3.1.

duty rule is – or at least can be – defined more “generously”. The result is that certain types of conduct, if performed by the landowner, would fall within the scope of chapter 2, namely the fault-based liability rules applicable to nuisance, and not of chapter 3, but, if performed by a contractor, could still fall within the scope of application of the non-delegable duty rule and, consequently, be subject to strict liability.

Now, this is conceptually not problematic, for the scope of application of these rules does not need to coincide. There are, indeed, good reasons to distinguish between both situations, apart from the level of risk. As explained in chapter 3, the distribution of risks performed by these rules is different: the basic rules of liability for withdrawing support distribute the risk of harm between pursuer and defender; whereas the non-delegable duty rule distributes such risk between defender and his independent contractor. The defender that is made strictly liable by virtue of a non-delegable duty might be able to recover from his contractor.<sup>166</sup>

The issue would be conceptually problematic only if, by employing a contractor, the defender could escape the strict liability rule that should apply to his abnormally dangerous conduct, but the situation is exactly the opposite: he only expands the scope of his possible strict liability by employing a contractor. In other words, any conduct that would be considered abnormally dangerous would also be enough to justify the application of a non-delegable duty, and the point would only become problematic if the position as between the two types of rules were to be reversed.

Yet the problem here is not about the scope of application of the rule. The problem is about the stability of the rule, both in its continued existence and justification. For even when most of the Sheriff Courts and Outer House decisions have accepted the application of a non-delegable duty when activities are inherently or necessarily dangerous,<sup>167</sup> the Inner House simply acknowledged this as a fact, without issuing an opinion on whether it was sufficiently justified in Scots law.<sup>168</sup> The solution provided by non-delegable duties is effective insofar as courts continue to

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<sup>166</sup> See p 138 above.

<sup>167</sup> A notable exception can be found in the *Southesk Trust Co Ltd* case (n 150).

<sup>168</sup> *Stewart v Malik* (n 149) at § 22.

recognise the existence of the rule and its risk-based justification. Yet the cases of *Stewart v Malik* and *Woodland v Essex CC* seem to show a trend in higher courts that departs from this line of justification in the context of support, to favour the alternative “duty-based” justification. And this justification can produce results that are inconsistent with the ones achieved by the application of the framework outlined in chapters 2 and 3.

### 3.2.3. Duty-based justification: inconsistent with abnormally dangerous conduct

The second line of justification, which is that adopted by the Inner House in *Stewart v Malik*<sup>169</sup> and by the Supreme Court in the English case of *Woodland v Essex CC*,<sup>170</sup> relies on the alleged positive nature of the duty to support. This might make sense in England, where relatively recent authority has concluded that the duty to support is, indeed, generally positive, even when the supported property is land.<sup>171</sup> In Scotland, however, the duty is said to comprise, in most contexts, merely a negative obligation.<sup>172</sup> There is a positive obligation to support only in the contexts of tenements and of common gables built on the boundary line, so the imposition of the non-delegable duty would be justified only with regard to this obligation.

Even in the contexts where there actually is a positive obligation, the non-delegable duty would not apply when what is breached is the negative obligation, which would be the case every time the landowners employs a contractor to do anything but repairs aimed at preserving support, which was, paradoxically, the case in *Stewart v Malik*. Yet the court, in this case, considered that the non-delegable duty rule was equally applicable, so we must conclude that it is the *existence* of the positive obligation and not its breach that justifies the application of the rule or, alternatively, that breaching the negative obligation entails necessarily a breach of the positive obligation, i.e. that interfering with support entails a failure to provide it.

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<sup>169</sup> Ibid at § 26.

<sup>170</sup> *Woodland v Essex CC* (n 155).

<sup>171</sup> Stevens (n 143) at 351, referring to *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836.

<sup>172</sup> See sections 2.1.1 to 2.1.4 above.

The consequence is evident: the nature of the duty has nothing to do with the level or kind of danger that the conduct involves. It is difficult to see how this justification could produce results that are consistent with the approach advanced here.

### 3.3. Conclusion

In conclusion, even though the mechanism of non-delegable duties seems to afford a practical alternative to the suggestion advanced in section 2.2.3 above, this solution is not satisfactory, for it is a solution that is contingent on the employment of independent contractors, and whatever the justification adopted for it, the results are problematic: on the risk-based justification, due to uncertainty; on the duty-based justification, due to inconsistency with the abovementioned suggestion.

## 4. THE GENERAL FRAMEWORK APPLIED TO WITHDRAWAL OF SUPPORT

It has been argued in this chapter that withdrawal of support should be subject to the general framework set in chapters 2 and 3 of this thesis. This section considers the results that this application would produce and contrasts them with the basic rules of support, highlighting where these results would be different under each of these sets of rules.

### 4.1. Withdrawal of support and nuisance

The law of nuisance has been considered applicable to withdrawal of support consistently since the 1970s, either totally or partially.<sup>173</sup> Over time, however, this circumstance has had a mixed reception, because of the consequences it entails for the basis of liability.

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<sup>173</sup> Contrast, e.g., *Macnab v Mcdevitt* (n 162), which treats as nuisance a case of withdrawal of support in a tenement, with *Reo Stakis* (n 123), which sees the categories as overlapping.

#### 4.1.1. Withdrawal of support as a nuisance before *RHM Bakeries*

The Inner House in the case of *Lord Advocate v The Reo Stakis Organisation*,<sup>174</sup> a case of withdrawal of adjacent support of land encumbered with buildings, recognised that nuisance and withdrawal of support were overlapping categories. In the decision, Lord President Emslie held that

[i]t is no doubt the case that in some instances an occupier whose property suffers such damage may find himself with a remedy both under the law of nuisance and upon the basis of infringement of an acquired right of support, but it is by no means unusual to find that more than one right of action is available upon the same set of facts. The comment [that the law of support would be superfluous], in short, does not impress us for there are many sets of circumstances in which the law of support has an important role to play where there is no possibility of an action founded on nuisance. The law of support in relation to buildings is part of the law of heritable rights. The law of nuisance on the other hand is part of the law of neighbourhood. A right of support once acquired for a building may be vindicated by the heritable proprietor thereof for damage which is in no way attributable to any act on the part of the proprietor for the time being of the subjects obliged to afford that support. A right of support, too, can provide a remedy in appropriate circumstances where the injured proprietor-occupier cannot establish that the damage suffered is *plus quam tolerabile*. There are many other examples which we see no advantage in rehearsing here, and these examples include instances in which a remedy under the law of nuisance may lie where either no right of support exists or no infringement of such a right is in issue.<sup>175</sup>

There are several statements in this dictum that are questionable. The distinction between “the law of heritable rights” and “the law of neighbourhood” is by no means clear, and it is also not clear what concrete consequences should be derived from it. Further, the distinction between withdrawal of support and nuisance based upon the person from whom damages can be claimed relies on the exclusion of liability of occupiers or tenants in the case of support, an issue that is at least debatable in the case of support of land,<sup>176</sup> and certainly inaccurate in the context of tenements since the enactment of the T(S)A.<sup>177</sup>

At the time, however, the dictum generated resistance for different reasons. By the time *Reo Stakis* was decided, the controversy about the basis of liability in nuisance

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<sup>174</sup> *Reo Stakis* (n 123).

<sup>175</sup> *Ibid* at 110.

<sup>176</sup> Compare Gordon & Wortley, *Land Law* § 5-116 with Reid, *Property* § 262.

<sup>177</sup> T(S)A s 9(1) imposes the restriction of withdrawing support upon the owner and the occupier.



was not yet settled,<sup>178</sup> and in the case the court considered it to be strict liability. Consequently, whether one treated the case as one of support or as one of nuisance, the liability rule would be the same: one of strict liability. Yet that result, in Gordon's view, would only be acceptable if there was, in fact, a right to support in the first place, which was not necessarily the case when buildings had been erected on the land. By allowing a nuisance claim when the law of support would not allow one, the pursuer could circumvent the restrictions of the law of support and obtain damages without proof of fault,<sup>179</sup> in circumstances where the logical result is that he would need to turn to the law of negligence.

If Reid's view about support of land encumbered by buildings were adopted, such problem would not arise. In his view, the right to support exists in this context naturally (not by acquisition)<sup>180</sup> and, therefore, its withdrawal would justify the imposition of strict liability. Both support and nuisance would provide the same answer. But Gordon proposed a different solution: he suggested that the assessment of the tolerability of the interference had to be made by reference to the right held. In this way, if the pursuer did not have the right to support, the interference could hardly be characterised as *plus quam tolerabile*.<sup>181</sup> The solution, however, came in a different form, as will be explained below.

A further issue noted at the time, in this case by Reid, was the consequence of understanding withdrawal of support as a nuisance in the context of tenements. According to the understanding of the common interest doctrine in the case of *Thomson*,<sup>182</sup> liability for withdrawing subjacent support of upper flats was fault-based. Nuisance rules, however, would give the pursuer the better alternative of strict liability. Reid did not consider this as a negative result, since in his opinion it was questionable that *Thomson* was correctly decided in the first place.<sup>183</sup> But this result would not last long.

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<sup>178</sup> The settlement would come four years later: see p 257 below.

<sup>179</sup> W M Gordon, "The Boundaries of Nuisance. Issues Raised by the *Reo Stakis* case" (1981) 26 JLSS 333 at 334-335.

<sup>180</sup> See p 230 above.

<sup>181</sup> Gordon, "The Boundaries of Nuisance. Issues Raised by the *Reo Stakis* case" (n 179) at 335.

<sup>182</sup> *Thomson v St Cuthbert's Cooperative Association Ltd* (n 79).

<sup>183</sup> Reid, "Common Interest. A Reassessment" (n 71) at 435-436.

#### 4.1.2. Withdrawal of support as a nuisance after *RHM Bakeries*

Four years after the decision in the *Reo Stakis* case, the dispute about the basis of liability in nuisance was finally settled in *RHM Bakeries*: damages claims require averment and proof of fault.<sup>184</sup>

This decision provided a solution for the problem identified by Gordon: now, liability in nuisance having been settled as fault-based, the inconsistency does not arise, since even if withdrawal of support is considered to be also a nuisance, nuisance rules would not provide for strict liability where support rules would not do so. In the context of support of buildings, in turn, the decision aligned the nuisance rule with the support rule.

Therefore, if before *RHM Bakeries* there were two available liability rules for withdrawal of support of buildings – the fault-based liability rule from support and the strict liability rule from nuisance, after *RHM Bakeries* this possibility disappeared, but persisted in the other contexts of support where nuisance would provide a fault-based liability rule and support would provide a strict liability rule.

As a consequence, in the context of support of buildings, subjecting disputes to nuisance rules does not change anything with regard to the basis of liability, for both sets of rules – basic rules and nuisance rules – provide the same answer. The change would be effected in the other contexts, namely support of land, in its natural state or with structures built upon the surface. Here, dismissing the basic rules in favour of an exclusive application of the nuisance rules would entail a shift from strict liability to fault-based liability.

There is, in the latter contexts, a further and very important consequence of treating withdrawal of support as a nuisance: it can extend the content of the right to support, from the negative obligation to the positive obligation. There is a line of English and Australian authority,<sup>185</sup> accepted in Scotland,<sup>186</sup> supporting the

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<sup>184</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 at 42 per Lord Fraser of Tullybelton.

<sup>185</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Goldman v Hargrave* [1967] 1 AC 645; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485.

contention that a landowner is liable for his failure to eliminate a nuisance that has been created in his land by nature or third parties and of which he has acquired knowledge.<sup>187</sup> This would expand the content of the right to include the positive obligation in all cases where it was not already recognised by the basic rules: a landowner would be liable not only if, in actively engaging in activities in his land, he withdraws support of his neighbour's land and causes damage, but also if support is withdrawn due to an event or condition not created by him but which he knew about and failed to correct.

#### 4.2. Withdrawal of support as the result of an abnormally dangerous conduct

The proposal here outlined does not entail ruling out strict liability completely when support is withdrawn. In fact, this liability rule should be applied when the conditions discussed in chapter 3 are met by the conduct that has withdrawal of support as a consequence, namely, when it is an abnormally dangerous conduct in the sense there described.

Many of the mining cases discussed in this chapter that were subjected to strict liability by virtue of the basic rules would have been solved in the same way under this approach: given that the methods employed were considered to be “proper” modes of working even when they involved the removal of all the minerals,<sup>188</sup> it is arguable that those cases fit the description of an abnormally dangerous conduct, for the risk of grave physical damage – i.e. subsidence of the land, destruction of houses and/or personal injury – is not adequately controlled by proper precautions.

The truly significant shift would take place in the currently more relevant context of support of buildings, for it involves the recognition of a strict liability rule for cases where currently only fault-based liability is believed to be available. It is important to note that, according to the argument presented in chapter 3,

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<sup>186</sup> Especially *Sedleigh-Denfield* (n 185). See *Watt v Jamieson* 1954 SC 56; *Plean Precast Ltd v National Coal Board* 1985 SC 77; *RHM Bakeries* (n 184); *Maloco v Littlewoods Organisation Ltd* 1987 SC (HL) 37; *Kennedy* (n 139); and *Canmore Housing Association Ltd v Baimsfather (t/a B R Autos)* 2004 SLT 673, among others.

<sup>187</sup> See chapter 2 section 5.2.3.

<sup>188</sup> See p 227 above.

abnormally dangerous conduct does *indeed* attract strict liability, so all that would be needed for the shift to take place is an acknowledgment of conduct resulting in withdrawal of support as abnormally dangerous when the relevant conditions are met. This stands in contrast with the argument presented above in connection with nuisance rules, which is a normative argument aimed at the dismissal of the basic liability rules for withdrawal of support of land.

It must be noted that the definition of abnormally dangerous conduct does not distinguish between acts and omissions. In this sense, just like the nuisance rules, the breach of both the positive and the negative obligations of support can trigger liability.

#### 4.3. Conclusion

In conclusion, the approach here proposed, namely to deal with support disputes simply under the general framework proposed in previous chapters for nuisance and abnormally dangerous activities, would introduce some relevant changes with regard to the basis of liability. Most notably, nuisance rules would, in principle, exclude strict liability for withdrawing support of land, unless the conduct can be characterised as abnormally dangerous. Conversely, the rules on abnormally dangerous conduct would admit the possibility of strict liability in the context of support of buildings.

### 5. CHAPTER CONCLUSIONS

As discussed above, the basic liability rules applicable to disputes regarding support, in their current formulation, are not adequately justified. It is argued that these disputes should be resolved according to the rules applicable to nuisance and abnormally dangerous conduct outlined in chapters 2 and 3.

In practice, a similar result is achieved through the application of non-delegable duties of care, which are pervasive in the support context. This solution, however, is not satisfactory, for not only is it contingent on the involvement of an independent contractor, but also, depending on the justification adopted for such

duty, might be unsustainable over time or produce results that are inconsistent with the treatment here advocated.

The result of the approach proposed here is that disputes arising from withdrawal of support of land would no longer be subject to a strict liability rule unless the conduct causing such withdrawal could be characterised as abnormally dangerous. Moreover, withdrawal of support of (sections of) buildings could indeed be subject to such a strict liability rule provided that the same characterisation can be made, contrary to the fault-based liability rule that applies today regardless of the level of risk.



## Conclusions

This thesis has presented an argument as to the basis of liability for damages claims in the context of neighbour law. It contends that such claims are subject to a set of two rules: a general fault-based liability rule applicable to nuisance, and a special strict liability rule for abnormally dangerous conduct. Chapter 1 explains what is meant in this thesis by fault-based and strict liability. Both of these rules, however, are problematic and require clarification with regard to their content and scope.

The first of these rules, discussed in chapter 2, derives from the leading cases of *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*<sup>1</sup> and *Kennedy v Glenbelle Ltd*.<sup>2</sup> While the first of these decisions established the general requirement of fault, the second adopted the so-called fault *continuum*: a catalogue of several available forms of fault that are connected to one another by an underlying spectrum of likelihood of harm. This formulation, imported from the American Rest (2d), features several issues requiring clarification and adjustment.

The first form of fault in this *continuum*, namely malice in the sense of improper motives, appears as a form of fault with a rather limited role, given its practical shortcomings. Intention in the sense of acting with the purpose of inflicting harm, in turn, seems to be omitted by the model, but it is only logical to consider it as an admitted form of fault.

Possibly the most salient problem with this model is that the evolution of the notions of intention in the form of knowledge of certainty of harm and of recklessness, as seen in subsequent case law and legal literature, points to these forms of fault as in fact disguising forms of strict – or, in the best case, stricter-than-normal – liability: by allowing the establishment of knowledge constructively. Insofar as the “mental state” component for these forms of fault is one of pure knowledge, liability might therefore be based solely upon a standard of foreseeability of harm. This plays against the aim of *RHM Bakeries*. Consequently, if full adherence to the fault principle

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<sup>1</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17.

<sup>2</sup> *Kennedy v Glenbelle Ltd* 1996 SC 95.

is to be achieved, it seems that only actual knowledge should be admitted in order to demonstrate these forms of fault.

Negligence, in contrast, is less problematic than it seems. As a form of fault – as opposed to the “delict of negligence” – it can be accommodated within the context of nuisance, contrary to claims in the literature. There is no incompatibility between the reasonable care test from negligence and the *plus quam tolerabile test* from nuisance. Moreover, addressing negligent nuisance under nuisance rules does not entail circumventing the limitations that are traditionally associated with the law of negligence.

More generally, it is arguable that the very notion of the fault *continuum* is not particularly helpful in explaining the links between the different forms of fault, and is even misleading. On the one hand, some of these forms are completely independent of any notion of likelihood of harm. On the other hand, those that actually depend on this notion, are not exclusively dependent on it, nor are they all conclusively attached to a particular level of likelihood.

The second liability rule, discussed in chapter 3, is that applicable to what in *Kennedy v Glenbelle Ltd* is called conduct causing a special risk of abnormal damage. A detailed analysis of the category’s sources and its subsequent application and discussion showed that both the nature of the liability rule and its scope of application – i.e. the definition of the boundaries of the category – are unclear.

As to the first aspect it is argued that, despite its orthodox characterisation as a form or implication of fault, this conduct attracts in fact strict liability. Fault-based accounts, relying on the notions of heightened standard of care, fault presumption, *res ipsa loquitur*, and even recklessness, proved to be insufficient in providing a satisfactory explanation of the acknowledged strict-liability-like effects of this rule.

Further, this orthodox view of the rule’s nature has obscured the fundamental need for a clear definition of the boundaries of this type of conduct, starting from the very terminology. Based on the available authority and general principles of delictual liability, it was argued that this conduct is better labelled simply as “abnormally dangerous”, and is defined as one that creates a high risk of grave physical damage which remains at such a level even if reasonable precautions are taken, provided that



the conduct is not one of common usage and that the defender has actual or constructive knowledge of the level of risk his conduct entails.

This two-rule model also explains the operation of liability imposed in cases of disputes arising from uses of water naturally running or present on land, discussed in chapter 4.

On the one hand, and despite the fact that disputes over uses of water have been subject to different categorisations, the current trend is clear: they are generally treated as nuisances, with the exception of disputes arising from drainage operations. Moreover, all these categories have reached the same solution with regard to the basis of liability: damages are based on the averment and proof of fault. What remains open is whether in the case of harm caused by drainage operations, the pursuer can benefit from the advantages of the fault model that has been so far applied only in the context of nuisance.

On the other hand, it has been argued that the traditional view of liability for interfering with the natural course of a stream, notably applied in the case of *Caledonian Rly Co v Greenock Corp*,<sup>3</sup> is correct: it does attract strict liability. And this is so precisely because it is an application of the second, special rule of liability for abnormally dangerous conduct, discussed above. This entails not only challenging the traditional explanation of this strict liability rule as grounded in the existence of riparian rights, but also partially challenging more recent accounts that seek to demonstrate that liability in these cases, and in the particular decision in *Caledonian Rly Co*, is based upon fault.

There is, however, a second group of specific disputes that does not fit the two-rule model presented in this thesis: those arising from withdrawal of support, discussed in chapter 5.

Fault-based and strict liability rules in this context depend on the type of property being supported and its physical position in relation to the supporting property. It has been argued that the distinction based on these elements is not adequately justified in the modern law and that the better and more logical approach

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<sup>3</sup> *Caledonian Railway Co v Greenock Corp* 1917 SC (HL) 56.

would be to resolve support disputes following the model here proposed, according to the level and type of risk created by the defender's conduct.

In practice, a result consistent with the proposed approach has been achieved through the application of the notion of non-delegable duties of care on the part of the landowner when the interfering operations are performed by an independent contractor. This solution, however, is not adequate. First, it is contingent on the operations actually being performed by such a contractor, which will not necessarily always be the case. Secondly, the operation of the non-delegable duty is problematic for these purposes on whatever line of justification one adopts: on the risk-based justification, the boundaries and even the continued existence of the duty are uncertain; on the duty-based justification, it can produce results that are inconsistent with the proposed approach.

The adoption of this approach would mean a shift in the basis of liability for the different types of support disputes. Withdrawal of subjacent or adjacent support of land, with or without structures built on the surface, would no longer be subject to a strict liability across the board: it would depend on whether the operations were characterised as abnormally dangerous conduct. Likewise, withdrawal of subjacent or adjacent support of (sections of) buildings would not necessarily be subject to the current fault-based liability rule that does not take into account the nature and level of risk that these operations can create: the strict liability rule for abnormally dangerous conduct should be equally applicable, provided that the relevant conditions are met.

In sum, the two-rule model of liability proposed in this thesis represents a unified framework that cuts across the subdivisions of neighbour law, adopting a consistent approach that focuses on distinctions that are sufficiently justified.

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